

20819

MODERN CASES,

ARGUED and ADJUDGED in the

Court of Queen's Bench,

A T

WESTMINSTER,

In the Second and Third Years of

Queen ANNE,

I N T H E

Time when Sir JOHN HOLT *fat*
Chief Justice there.

With Two TABLES: The First, Of the *Names* of the *Cases*: And the
Other, Of the special *Matter* therein contained.

V O L. VI.

The FOURTH EDITION.

Reviewed and Corrected, and many Thousand New and Proper References
added, *never before Printed*, from all the Books of Reports, down to
the Year 1757.

By DANBY PICKERING, of *Gray's Inn*, Esq;
And Reader of the Law-Lecture to that Honourable SOCIETY.

In the SAVOY:

Printed by *Henry Lintot*, Law-Printer to the King's most Excellent Majesty; for
T. OSBORNE and J. SHIPTON in *Gray's Inn*;
D. MIDWINTER, E. WICKSTEED, D. BROWNE, J. SHUCKBURGH,
J. WORRALL, T. WALLER, and T. TRYE. MDCCLVII.

M O D E R N C A S E S

C O U N T E R P O I N T

H I S T O R Y

C H A N C E

T H E W H E N

C O U N T E R P O I N T



T H E
P R E F A C E
T O T H E
R E A D E R S.

IT is not to be doubted, but that, upon a serious Perusal, these *Reports*, now presented to you, will appear to be taken with great Care and Solidity, several eminent Persons of distinguishing Judgments in Matters of this Nature having recommended and encouraged this Undertaking: The Author seems to be a studious and observing Gentleman, who was attendant at the Bar many Years, and had Time and Ability sufficient for such a Performance.

I will only first observe, That these ensuing *Cases* were lately argued and adjudged in the *Queen's Bench*, and never printed before; so as there are no Contemporary Reports yet extant: And it is a good Observation of my Lord Coke, *That latter Resolutions and Judgments are the surest, and therefore best to season Students in settling their Judgment.* And for that Purpose, I observe here are some Resolutions, which either explode or correct former Resolutions, as being Opinions wavering and not well digested, or not fully agreeable to the Rule and Reason of the Law.

In short, These were taken when my Lord Chief Justice *Holt*, the great Master of Experience of the Practice of that Court, sat there.

But for that it is known, that Prefacers extravagant Recommendations of Books are very suspicious, and thereupon the Readers not finding them answerable to the *Præ-encomiums*, their over-raised Expectations become pall'd, and they throw them aside with Slight and Indignation; therefore these *Cases*, as argued and resolved, are wholly submitted to your respective Judgments. *Valete.*

A

A

T A B L E

O F T H E

N A M E S

O F T H E

C A S E S.

A.			Page
A	Dams <i>versus</i> Tertenants of Savage,		
	<i>Page</i> 134, 199, 226		
	Anonymus,	132, 153, 263	
	Anonymus <i>versus</i> Cowper,	90	
	Anonymus <i>versus</i> Catchmade,	90	
	Arnote <i>versus</i> Bream,	244	
	Ashby <i>versus</i> White,	54	
	Astry (<i>Sir Samuel's Case</i>)	123	
	Overseers of the Poor of St. Andrew's,	77	
B.			
B	Attersby <i>versus</i> Marth,	80	
	Baldwin <i>versus</i> Cole,	212	
	Banbury (<i>Lord</i>) <i>versus</i> Wood,	84	
	Bangley <i>versus</i> Titchcombe,	14	
	Baker <i>versus</i> Pierce,		23
	Barber <i>versus</i> Dennis,		69
	Bernardiston <i>versus</i> Vicecom' Mid',		309
	Berwick <i>versus</i> Andrews,		125
	Bignall <i>versus</i> Devnish,		242
	Bishop of Durham <i>versus</i> Ladler,		71
	Blakamore <i>versus</i> Tiddlerly,		240
	Boisloe <i>versus</i> Baily,		221
	Booth <i>versus</i> Booth,		288
	Bovey <i>versus</i> Wheeler,		267
	Bourkamire <i>versus</i> Darnell,		248
	Brewster <i>versus</i> Weld,		229
	Brigs <i>versus</i> Collington,		70
	Britton <i>versus</i> Standish,		188
	Brough <i>versus</i> Parkins,		80
	Buller <i>versus</i> Crips,		29
	Burridge <i>versus</i> Fortescue,		60
	Bushel <i>versus</i> Pasmore,		217
	Butler <i>versus</i> Rolfe,		25
	Buxom <i>versus</i> Hoskins,		263
	Burnaby <i>versus</i> Saunderson,		174
			C.

The Names of the CASES.

C.

C ALY <i>versus</i> Hardy & alios,	Page
	164
Carleton <i>versus</i> Mortagh,	113, 206
Catchmade's <i>Case</i> ,	90
Chetly <i>versus</i> Wood,	42
Cholmley <i>versus</i> Veale,	304
Claxton <i>versus</i> Bafty,	58
Clement <i>versus</i> Scudamore,	120
Clerk <i>versus</i> Delay,	151
Clerk <i>versus</i> Withers,	290
Cockroft <i>versus</i> Smith,	230, 263
Cole <i>versus</i> Turner,	149
College of Physicians <i>versus</i> Rose,	44
Collins <i>versus</i> Jeffot,	155
Lady Cook <i>versus</i> Remington,	237
Cornish <i>versus</i> Marks,	17
Cotton <i>versus</i> Martin,	63
Countess of Bridgwater, <i>versus</i> Ducem de Bolton,	106
Cragger <i>versus</i> Glover,	301
Cragg <i>versus</i> Bowman,	147
Crocket's <i>Case</i> ,	175
Cross <i>versus</i> Bolson,	102
Crowder <i>versus</i> Oldfield,	19
Cuddon <i>versus</i> Provost,	123
Cuddon <i>versus</i> Estwick,	<i>Ibid.</i>
Culliford's <i>Case</i> ,	219
Cunmer <i>versus</i> Milton Parishes,	87
Cowper's <i>Case</i> ,	90

D.

D AY <i>versus</i> Musket,	80
Davenant <i>versus</i> Rafter,	235
Davy <i>versus</i> Salter,	250
Dean <i>versus</i> Crane,	309
Denham <i>versus</i> Stephenson,	241
Dennis <i>versus</i> Doctor Lane,	131
Dillon <i>versus</i> Brown,	14
Dod <i>versus</i> Monger,	215
Dockmanny <i>versus</i> Davenant,	198
Dove <i>versus</i> Smith,	153

E.

E Lderton's <i>Case</i> , and others,	Page 73
Elmore <i>versus</i> Tucker,	198
Elwis <i>versus</i> Lombe,	117
Emerton <i>versus</i> Selby,	114
Evans <i>versus</i> Roberts,	61
Ewer <i>versus</i> Jones,	25

F.

F Anshaw <i>versus</i> Morrison,	157, 197
Fazakerly <i>versus</i> Baldoe,	177
Fitzhugh <i>versus</i> Dennington,	227, 259
French's <i>Case</i> ,	247
Fox <i>versus</i> Tilly,	225
Ford <i>versus</i> Lord Grey	44
Foxon <i>versus</i> Mosely,	154

G.

G Arden <i>versus</i> Exon,	88
Garibaldo <i>versus</i> Cagnoni,	90,
	266
Gawdy <i>versus</i> Pickersale,	165
Genner <i>versus</i> Spark,	173
Gibbon <i>versus</i> Dove,	230
Gilbert <i>versus</i> Parker,	158
Goddard <i>versus</i> Smith,	261
Godolphin <i>versus</i> Tudor,	38, 234
Gree <i>versus</i> Sharp,	265
Grovenor <i>versus</i> Soame,	122
Greaves <i>versus</i> Blanchett,	148
Grant <i>versus</i> Southers,	183

H.

H ALE <i>versus</i> Claro,	149
Harvey <i>versus</i> Broad,	148, 159
	196
Harwood <i>versus</i> Turberville,	203
Heins <i>versus</i> Hancock,	140
Herring <i>versus</i> Croker,	184
a	Hodges

The Names of the CASES.

Hodges <i>versus</i> Templar,	Page 191
Holderstaff <i>versus</i> Saunders,	16
Holmes <i>versus</i> Hall,	161
Horner <i>versus</i> Bonner,	86, 96
Hothershel <i>versus</i> Bows,	21
Hutton <i>versus</i> Mansell,	172

I.

Jacob <i>versus</i> Dallow,	230
Jenkins & Uxor <i>versus</i> Plombe,	91, 181
Jevon <i>versus</i> Turner,	86
Inhabitant' Paroch' de Westbury in Com' Wilts <i>versus</i> Inhabitant' de Coftham,	213
Inman <i>versus</i> Crew,	85
Johnson <i>versus</i> Shepney,	79
Johnson & Uxor <i>versus</i> Browning,	216
Jordan <i>versus</i> Thomkins,	77
Jose <i>versus</i> Mills,	14
Ireland's Case,	101

K.

Kent's Case,	138
Kingsdale <i>versus</i> Mann,	27
Knight <i>versus</i> Burton,	231

L.

Lady Cook <i>versus</i> Remington,	237
Lamb <i>versus</i> Williams,	82
Langford <i>versus</i> Administrator of Tyler,	162
Leicester <i>versus</i> Foy,	261
Leonard <i>versus</i> Stacy,	68, 139
Lepicott <i>versus</i> Browne,	198
Lefauld <i>versus</i> Dyer,	57
Lett <i>versus</i> Mills,	105
Lewis <i>versus</i> Jones,	138
Lidford <i>versus</i> Thomas	96
Longueville <i>versus</i> Hund' de Thistle- worth,	27
Lord Banbury <i>versus</i> Wood,	84
Lynch <i>versus</i> Hooke,	225, 311

M.

Mayor of Winchester <i>versus</i> Wilks,	Page 21
Mr. Medlicot's Case,	137
Michelson <i>versus</i> Cawsey,	72
Michell <i>versus</i> Waldren,	306
Middleton <i>versus</i> Haw,	242
Mills <i>versus</i> Wilkins,	62
Lord Mohun's Case,	59
Monkton <i>versus</i> Ashly & al'.	38
Moor <i>versus</i> Rowbothom,	162
Morgan <i>versus</i> Thomkins,	115
Morley <i>versus</i> Stacker,	83
Muriell <i>versus</i> Tracy,	169

N.

Neal <i>versus</i> Goulston,	167
Noel <i>versus</i> Gray,	22

O.

Oates <i>versus</i> Bromill,	160, 176
Ogden <i>versus</i> Turner,	104
Oliver <i>versus</i> Vernon,	170
Osborn <i>versus</i> Hofier,	167
Overseers of the Poor of the Parish of St. Andrew's,	77

P.

Parish of St. Clement's <i>versus</i> that of St. Andrew's,	287
Parker <i>versus</i> Clerke,	252
Parker <i>versus</i> Sir Will. More,	95
Parkins <i>versus</i> Chatherton,	159
Parkins <i>versus</i> Woolaston,	130, 139
Peat's Case,	228, 310
Phips <i>versus</i> Jackson,	305
Physicians College <i>versus</i> Rose,	44
Poply <i>versus</i> Ashly,	147
Powel <i>versus</i> Ball,	210
Presgrove <i>versus</i> Saunders,	81

The Names of the CASES.

R.

Bains,	Page 192
Ball,	78
Banks, (Sir Jacob)	245
Bath (Mayor, &c.)	152
Best & al',	137, 185
Bothell,	17, 33
Branworth,	240
Brown,	87
Buck & Hale,	306
Bucklew (Duchefs) & al',	150
Carter,	
Clitheroe, (Town)	133
Cluworth, (Inhabitants)	163
Collingwood,	288
Corbett,	91
Cotesworth,	172, 180
Cox & Earle, &c.	31
Crisp,	137
Crofs,	43
Daniel	99, 182, 289
Dixon,	61
Dyer,	41, 96
Earl, Cox & al',	31
Foxby,	11, 178, 213, 239
Franklin,	220
George,	40, 57
Glin & al',	87
Gold,	163
Guy,	89
Hale & Buck,	306
Hannon,	311
Hereford, (Mayor)	309
Hoskins,	58
Inhabit' de Com' Wilts,	191, 307
Lane,	128
Langley,	124
Leich,	145
Littleport, (Parish)	97
London,	204
Macarty,	301

Domina Regina
versus

Domina Regina
versus

Reignots versus Tipping,	241
Ride versus Ride,	239
Rich versus Aldred,	216
Rich versus Doughty,	154
Robinson versus Callow,	82
Robinson versus Gofnold,	171
Roswell versus Pryor,	116
Robert versus Harnage,	228
Rowston versus Combat,	157
Ruffell versus Corn,	127

Middlemore, Page 212	
Newnham Murry (Inhabitants)	163
Orbell,	42
Pugh & al'	140
Rawlins,	243
Saintiff,	255
Steer,	185
Thetford, (Mayor)	25
Tracy, 30, 114, 178	
Tutchin,	164, 268
Warden of the Fleet,	18
Watton,	95
Weekes,	220
West,	180
Wheeler,	
Wilts Com' (Inhabitants)	191, 307

S.

Adler's Company versus Jones,	78
Saunders versus Melhuish,	73
Scott (Sir Harry) versus Brace, &c.	38
Scrimshaw versus Westby,	302
Selby versus Green,	233
Sexton's Case,	163
Shepherd and Baily versus Orchard,	40
Shuttle versus Wood,	132
Sir Samuel Astrey's Case,	123
Slater versus May,	304
Smartle versus Penhallow,	63
Smith versus the Mayor and Aldermen of London,	78
Smith	

The Names of the CASES.

Smith <i>versus</i> Aiery,	Page 128
Smith <i>versus</i> Harmon,	142
Smith <i>versus</i> Bartlet,	156
Souther's <i>Case</i> ,	133
Sparks <i>versus</i> Wood,	146
Squire <i>versus</i> Grevell,	33
Stanion <i>versus</i> Davis,	223
Staple <i>versus</i> Haydon,	1
Stillingfleet <i>versus</i> Sir Harry Parker,	248
Strong <i>versus</i> Courtney,	265
Sutton's <i>Case</i> ,	57, 91

T.

T emplar's <i>Case</i> ,	191
Tenant <i>versus</i> Goldwin,	311
Tilsden <i>versus</i> Parfriman,	253
Tracy <i>versus</i> Talbot,	214
Trantor <i>versus</i> Watson,	11
Trevill <i>versus</i> Edwards,	308
Trevivan <i>versus</i> Lawrence,	256
Thornborough <i>versus</i> Whitacre,	305
Turner <i>versus</i> Nurse,	149

V.

V aughan <i>versus</i> Company of Gun- makers in London,	82
Villars <i>versus</i> Cary,	303

W.

W alden <i>versus</i> Holman, Page 115	
Walmsely <i>versus</i> Ruffel,	200
Ward <i>versus</i> Evans,	36
Ward <i>versus</i> Apprice,	264
Warren <i>versus</i> Fuz,	22
Warren <i>versus</i> Mathews,	73
Warden and Company of Sadlers <i>versus</i> Jones,	165
Warden of the Fleet's <i>Case</i> ,	18
Wells <i>versus</i> Osmond,	238
Westbury (Inhabit') <i>versus</i> Coftham,	213
Wey <i>versus</i> Yelly,	194
White's <i>Case</i> ,	18
White <i>versus</i> Bodiman,	150
Wiat qui tam <i>versus</i> Ayland,	33
Wigg <i>versus</i> Rook,	86
William <i>versus</i> Farrow,	82
Williams <i>versus</i> Jackson,	146
Williams <i>versus</i> Hoskins,	310
Wilson <i>versus</i> Gray,	211
Winchester (Mayor) <i>versus</i> Wilks,	21
Winter <i>versus</i> Garlick,	195
Wood <i>versus</i> Shepherd,	24
Woodcock <i>versus</i> Morgan,	306
White's <i>Case</i> , a <i>Mandamus</i>	18

D E

Term. Sancti Mich.

Anno 2 Annæ, in B. R.

Staple *versus* Heydon.

S. C. 1 Salk.
173, 216.
2 Salk. 579.
S. C. Ld.
Raym. 922.

The Case,

THE Plaintiff S. brings Trespass against J. H. and G. Fowler, for that they on the 31st of May in the 13th Year of the late King William, broke his Close, called the Wharf in Stepney in Middlesex, and threw down a Perch of Rails therein standing: And also, for that on the 7th of July following, they entered into the same Wharf, and committed the like Trespass.

The Defendant G. F. as to all, pleads Not guilty: But J. H. as to the Trespass laid on the 31st of May, pleads Not guilty as to the Force, and justifies the Entry, and throwing down the Rails; for that long before one Edw. G. was possessed by Virtue of a certain Lease for eighty Years then to come, and yet unexpired, of the said Wharf, and also of a Yard next adjoining thereunto; and that for the necessary Use of the said Yard, he had and used a Way over the said Wharf to a certain Stairs on the River Thames, which was thereunto contiguous, there to take Water, &c. and being so possessed, he on such a Day and Year, which was prior to the Time laid in the Trespass, demised the said Yard (inter alia) to the Defendant J. H. for a Term of Years yet unexpired, with all lawful Ways, &c. thereunto belonging: By Virtue whereof he entered, and was possessed, &c. whereby he was entitled to the said Way: That the Plaintiff obstructed it with Rails; so he coming to use it, could not pass; and that he requested the Plaintiff to open the Rails, which he refused; so he justified the throwing them down, and pleads directly in the same Manner to the other Trespass laid on the 7th of July; and avers, That at the several Times he had no other Way to the said Stairs and River Thames than by and through the said Wharf.

Non. Cul.
Hob. 66.
Justification.
2 Mod. 143.
See Carth. 75.
176, 281.
Skin. 228,
664.
Salk. 407,
&c. 517.
Sir M. Hale's
Notes on F.
N. B. 86. K.

B

Plaintiff,

Hob. 66.

Plaintiff, as to the Plea to the first Trespass, replies, That the Defendant J. H. had another convenient Way to the River Thames than through the said Wharf; and thereupon they are at Issue; and upon the Plea to the Trespass on the seventh of July he demurs, Ideo fiat Jurat, to try the Issues, and assess contingent Damages upon the Demurrer. Both Defendants make Default at Nisi prius; which being recorded, the Inquest is awarded by Default, and G. Fowler is found guilty of the Trespass on the 31st of May, but acquitted of that on the 7th of July; and J. H. is acquitted of the Trespass on the 31st of May as to the Force, but the Jury found as to the rest, that he had no other Way to the said Stairs and River Thames than through the said Wharf, and assess Damages upon the Demurrer, and acquit him of the Trespass on the 7th of July.

In this Case several Points were moved, and resolved by the Court:

1. Repleader.
If a Repleader ought to be in this Case.

When a Repleader shall be upon an immaterial Issue.

Post 102.

Carth. 371.

Vide Dr.

pl. 311.

Ld. Raym.

134, 169, 170, 391, 707, 970. Cas. temp. An. 46.

Where the Amendment must begin as to Repleader.

* 5 E. 4. 8.

19 E. 4. 1.

Vide Dyer

117, 118.

Error.

No Costs on Award of Repleader.

General Rule of Repleader.

Q. 1. Whether a Repleader should be in this Case, there being, as was said, an immaterial Issue joined? And the Court held clearly the Issue was impertinent; but as to Repleaders in general, The Court held,

1. That a Repleader is to be awarded when such an Issue is joined, as the Court after Trial thereof cannot give a Judgment, as being impertinent or uncertain, and not determining the Right. 22 H. 6. 16. Vide 1 Lev. 32. 1 Keb. 23, 39, 89.

2. That before the Statute of Jeofails, if such an Issue were joined, the Court before Trial might award a Repleader. 2 Salk. 579. 1 Salk. 216. Vide 3 Keb. 664.

3. When a Repleader is awarded, the * Amendment must begin where the Plea, which makes the Issue bad, begins to be faulty; and therefore if one makes himself a bad Title to his Declaration, to which there is a bad Bar, and thereupon a bad Replication on which there is Issue, there the Repleader must be awarded and entered on Record; and the Plaintiff shall declare de Novo, &c. But if the Bar be good, or the Plea be good, and the Replication bad, and Issue thereupon, there a Repleader will be only as to Replication; but if Bar and Replication be both bad, and a Repleader is awarded, it must be as to both. Vide 3 Keb. 664.

4. If the Court award a Repleader where it ought not to have been, or deny it when it ought to be, it is Error. 2 Salk. 579. Vide Post 102.

5. That upon Award of Repleader, there must be no Costs, because it is a Judgment of the Court upon the Pleading; but upon Amendment of a Plea in Paper, there must be Costs.

6. That upon a general Rule for Repleader, without any Direction from the Court from what they should begin the Repleader, it must begin from the first Fault which occasioned the bad Pleading commenced; for the Judgment is quod partes replacitent. 2 Salk. 579.

7. That the Pleadings in this Case were such as a Repleader would be awarded upon at the Common Law; for the Defendant having insisted upon a Title to a Way by Grant, his Averment, That he had no other Way, was immaterial, and by Consequence the Issue thereupon impertinent; besides, there was no Issue at all joined, for the Plaintiff's Affirmative does not meet with the Defendant's Negative.

Averment
immaterial,
and the Issue
impertinent.
Carth. 371.

8. That though a Repleader should have been at Common Law in this Case, this Motion having been made before Trial, and it being doubtful whether a Verdict would not help it by the Statute of Jeoffails, the Court said it would be just in them not to grant a Repleader till after Verdict; for they said they might indeed grant a Repleader before Verdict at Common Law, but they were not bound to do it. So note the Diversity since the Statute; for though it were reasonable to award a Repleader before Verdict at Common Law, where the Pleading appeared such on which no Judgment could be after Verdict; yet since the Statute, when a Verdict may cure immaterial or informal Issues, it may not be proper to do it.

Repleader by
Common
Law, and
when grant-
able.

Aid by Sta-
tute Law.

9. After the Trial, the Court held, That this Issue was such on which no Judgment could be; for the Defendant pleaded, That he had no other Way to the Stairs and River Thames. The Plaintiff replies, That he had another Way to the Thames; and the Jury found no other Way to the said Stairs and River Thames; so in Truth there was no Issue joined.

Vide 2 Lev.
135. Acc. 12.
2 Saund. 318,
319.

10. That in this Case there could be no Repleader, for the Parties were quite out of Court by the Default.

N. B. Per 40 Ed. 3. 15. If a Jury do not find Assets to a certain Value, the Verdict is insufficient, and a Repleader shall be granted, and the Issue tried by another Inquest. Vide Cro. Eliz. 318, 883.

Repleader af-
ter Verdict.

2dly. In Reference to the Way claimed, these Points were agreed on by all, viz.

2. Way
claimed.
Post 149, 163.
Carth. 451.
Points agreed.
Ld. Raym.
75, 1093.

1. That a Man cannot claim a Way over my Ground from one Part thereof to another; but from one Part of his own Ground to another, he may claim a Way over my Ground.

2. A Stranger may have a Way over another's Soil three Manner of Ways, viz. For Necessity, by Grant, and by Prescription; For Necessity; as if A. has an Acre of Ground surrounded by Ground of B. A. for Necessity has a Way over a convenient Part of B.'s Ground to his own Soil, as a necessary Incident to his Ground: So if A. grant a Piece of Land which is surrounded by Land of the Vendor, he grants a Way as a necessary Incident therewith. 2 Rol. Abr. 60. Post 149.

Vide 2 Cro.
170.
Way
1. For Ne-
cessity.

3. If one be seised of Black-acre and White-acre, and uses a Way over White-acre from Black-acre to a Mill, River, &c. and he grants Black-acre to B. with all Ways, Easements, &c. the Grantee shall have the same Conveniency that the Grantor had, when he had Black-acre: So if A. has two Acres of Land, and has a Way from them over another's Soil, and grants one of them with all Ways, the Grantee shall have the same Way that the Grantor had: But there the

2. By Grant
2 Cro. 121,
122, 170.
3 Lev. 305.

the Grantee in making Title must alledge such an Estate in the Grantor as is traversable, and not only say, that the Grantor was possessed of the Place, to which, &c. for a Term of Years; for there the Possession would be traversable materially.

3. By Prescription.
Noy 9.
Farrl. 55.
The Way of Pleading a particular Estate.
6 Co. 60.
Ld. Raym. 1093.
A Way of Necessity.

If a Way of Necessity be claimed, it is a good Plea to say, the Party has another Way; but secus where a Way is claimed by Grant or Prescription.

4. The Way of Pleading in this Case had been to shew, that such a one was seised in Fee of the Place to which, &c. and being so seised was intitled to a Way, and shew how, and that he granted to the Lessor, &c. who also granted it to him, &c. For when one shews a particular Estate, he must settle the Fee in Somebody.

5. It was agreed, That by Grant of a House to which there is a Way of Necessity, without more, the Grantee shall have the Way as well as if it were specially mentioned in the Grant. 2 Cro. 190 & 170. Vide Hob. 234, 295, & ante.

3d Point.

It was resolved, That if the Plaintiff had demurred to the Defendant's Plea, without Doubt he should have had Judgment. For resolv'd [Vide Rigeway's Case] That after a Demurrer a Repleader shall not be, because the Parties by mutual Assent have put themselves on the Judgment of the Court. Li. 3. 52. Vide Doctr. plac. 311. sed vide post 102, & 3 Lev. 440. contr.

4th Point.
If aided here by the Stat.

Upon the Point, whether the Matter were now cured after Verdict by the Statute of Jeofails, these Points were agreed:

1. If a Jury find a Point in Issue, and a superfluous Matter over and above, that shall not vitiate the Verdict.

2. That in this Case the Jury found nothing that was put in Issue; for they do not find that either he had no other Way, or had another Way to the Thames; but that he had no other Way to the Stairs and Thames, which might well be, and yet he might have another Way to the Thames.

5th Point.
Diversity.
As to Defaults after Issue, &c. in Real Actions.
1 Lev. 105.
1 Mod. 248, 249.
2 Show. 424.
Vide 1 Salk. 216, 217.
1 Bullst. 160, 161.
Vide 2 Cro. 36.
1 Vent. 60.
2 Saund. 45.
1 Jo. 412, 413.
1 Cro. 517.
Stra. 46, 612.

As to Defaults after Issue, the Court took a Diversity between a Real and Personal Action; for in a Real Action, if a Tenant make Default, the Demandant may, if he please, waive the Benefit of it, and proceed by further Process against him; as if the Tenant make Default on the Original, the Demandant shall have a * Grand Cape; and if the Tenant do not save his Default, the Demandant, if he insists upon it, shall have Judgment final upon the first Default, (i. e. at the Return of the Grand Cape) but he may, if he please, release the Default, and continue further Process against him: In like manner of a Default after Appearance, the Demandant shall have a Petit Cape, &c. and if the Tenant do not save his Default, he may have Judgment upon the Default; or if he will waive that Advantage, he may, and proceed by further Process. If in a Real Action the Tenant make Default at Nisi prius, the Default is never recorded, but only the Postea marked; and the Demandant, if he will, shall have a Petit Cape, and Judgment thereupon, if the Default

See 2 Inst. 80.

* See 1 Lev. 105. That Judgment ought not to be given on a Default in real Actions, but that a Grand Cape ought to issue on a Default before Appearance, and a Petit Cape if the Default be after Appearance.

be not saved; or else he may waive the Default, and continue with further Process. But in case of a Personal Action, a Default at the Trial is always recorded, and there is no further Process in Law to bring the Defendant into Court upon Release of the Default. And antiently at every Continuance-day the Parties were demandable; and if the Defendant did not appear, or were not essoin'd, his Default was recorded, and Judgment given against him thereupon: But by the Statute of Marlbridge, c. 13. and Westm. 2. c. 27. after Issue join'd in a personal Action, the Defendant shall have but one Essoin and one Default; and if the Default be upon the Venire fac', then it is recorded, and a Distringas shall go against the Jur' ad triand', and against the Defendant, to receive his Judgment; but if he comes in at the Day of Nisi prius, he saves his Default; but if he does not, the Default is peremptory, and final Judgment shall be given thereupon. And it is to be observed, That this one Essoin and one Default that the Statutes give, must be at the first Continuance after the Issue; for if the Defendant should appear at the first Continuance, viz. at the Venire fac', he shall neither be essoined, or have a Default saved at the Return of the Distringas; but Judgment peremptory shall be given on such Default. 2 Inst. 217.

Personal
Actions.

1 Cro. 511.
Essoins in a
Personal
Action.

Default pe-
remptory.

But if the Defendant imparl to a Day in a Personal Action, and does not appear at the Day, Judgment final shall be given against him; for the Default is peremptory to him, and there is no Process to bring him into Court again. Vide 38 H. 6. 33. In Debt, the Defendant pleads in Abatement to the Writ, to which the Plaintiff imparls, and at the Day given the Defendant makes Default: Judgment final is upon the Default, tho' the Plea was only in Abatement. 18 E. 4. 7. In Trespass, the Defendant demurred, and made Default at the Day given, and Judgment final. In Debt upon an Obligation, the Defendant pleads a Release, and after Demurrer Day is given, and Default is made by the Defendant at the Day; Judgment final shall be given. Vide 1 H. 7. 11. In Trespass Defendant imparls, and makes Default at the Day, Judgment final shall be given: So in Debt, 11 H. 7. 5. and the Case in 2 Cro. 357. was remembred, where a Judgment in an inferior Court was reversed for this Error; that the Defendant being essoined, and making Default at the Day given by Essoin, they gave a further Day when it should be a Judgment by Default.

Impar lance,
and Default,
in a Personal
Action.

Abatement
in Debt.

Demurrer in
Trespass, &c.

Caf. temp.
Mac. 30, 83.
Judgment
final.
Ld. Raym.
17, 80.

So now, what stuck with the Court was, Whether Judgment should be given upon the Demurrer against the Defendant, or upon the Default? That is, Whether he being out of Court as to one Issue by the Default, he could be present in Court as to the Issue in Law upon the Demurrer, so that the Court might give Judgment thereupon? And as to this Point, the Case was, A Defendant in two several Trespasses pleads an ill Plea to one; on which the Plaintiff demurs, and joins Issue upon the other, and makes Default at the Day of Nisi prius; whereupon the Inquest is taken by Default as to the Issue, and contingent Damages upon the Demurrer. And Ward, for the Plaintiff, argued, That Judgment ought to be upon the Demurrer.

Whether here
Judgment
should be up-
on the De-
murrer, or
upon the De-
fault.

Diversity as
to Defaults of
the Defen-
dants.

1. This is not such a Default on which Judgment can be given; and he took this Diversity, That where-ever in a real Action the Default is saveable, so that Grand or Petit Cape shall go, there in a personal Action a Default is not peremptory; but there is indeed a proper Process to issue, and bring the Party into Court. As for the Purpose, in a real Action after Imparlance Prece Partium, or upon Essoin, if the Party having chose his Day fail thereupon, peremptory Judgment shall be thereupon, and the Lands seised; and in that Case, Judgment would be likewise peremptory in a personal Action; but if the Default were upon the Return of a Process, which is saveable in a real Action, there Judgment peremptory ought not to be in a personal Action, because there the Day is not taken or chosen by the Party, but given to him by the Court; and it seems but reasonable he should be more severely used upon his Default at his own Day, than at a Dies datus by the Court.

As to Default
of Plaintiff,
&c.

But this is only in Reference to Defendants; but in Case of Plaintiffs, they are in many Cases demandable at Day given to pursue their Writ: But in Case of Defendants, upon Default at a Day given before Plea pleaded, there shall be no Judgment peremptory. Vide 7 H. 6. 19, 41. 19 H. 8. 6.

In Trespals the Defendant appeared upon the Exigent, and Day is given over to another Term, at which the Defendant makes Default; and per Cur. The Plaintiff can only have Process Ad respond, and if he fail thereat, then three Capias's and Exigent as before; and he quoted 20 Ed. 3. 12. 2 H. 4. 1. pl. 3. 2 H. 4. 4. 11 H. 4. 31, 32. 20 H. 6. 44. Jud. Reg. 1. a, b.

Breve ad au-
diendum Ju-
dicium.

The Writ of Ad audiend' Judicium was of great Use then, tho' now altogether disused:

Yelv. 97.
11 Co. 6. b.

37 H. 6. 29. gives an Account of it, that formerly, when a Demurrer was joined in a real or personal Action, this Writ used to go to bring the Parties in to hear Judgment; but now the Course is, that he attend at his Peril. 4 H. 6. 29. That the Defendant is not demandable on Demurrer, but the Plaintiff is only to appear and pray his Judgment. Just as upon a Writ of Enquiry of Damages, the Defendant has no Day in Bank; and in the Common Pleas, neither Plaintiff nor Defendant have a Day given them, but the Plaintiff is to attend for his Judgment. Cro. Eliz. 75, 144.

Here are two
distinct Mat-
ters in the
Ve. fa.

But the Plaintiff has a Day by Course of B. R. Yelv. 97. 1 Rol. Abr. 486. Now here, tho' there be but one Ve. fa. to try the Issue, and inquire of the contingent Damages; yet these are as two distinct Matters; for antiently the Course was not to put both together; but that is new, and for Ease and Dispatch; and here the Jury might have been discharged of the Issue, and yet inquire of the Damages as an Inquest of Office. 16 Ed. 4. 1. 2 Inst. 440.

How if Judg-
ment were to
be upon the
Default.

2. He insisted on it, That if Judgment were to be upon the Default, it must have been given at the Nisi prius, and that being not done, and the Default being for the Plaintiff's Advantage,

tage, he might waive or release it, and quoted 42 Ed. 3. 1. and the Defendant upon a Writ of Error can never take Advantage of the Matter. Vide 2 Saund. 46.

Darnel contra. Where-ever there is a Demurrer in any personal Action, and the Defendant makes Default at the Day, the Demurrer is waived. F. Default 59. 38 H. 6. 33. In personal Actions, if the Parties are at Issue or Demurrer, and after Defendant makes Default, Judgment shall be upon the Default, and the Demurrer is waived. Bro. Default, 58. 39 H. 6. 16. and continued to 18. Bro. Default, 73. Fitz. Jo r, 33. Process, 147. 45 Ed. 3. 3. And as to the Objection, That if Judgment were to be given on the Default, it should have been immediately. Answer: All that the Judges of Nisi prius could do was, to record the Default.

Demurrer waived by Default in a personal Action.

Powell Justice. I do not find but the Parties are demandable, both in Case of Day given upon Demurrer, and upon Issue joined; but after Issue, Inquest may be taken by Default. But in Debt, suppose the Defendant comes in upon the Exigent, and the Plaintiff, as he may, prays a Day; there it being at Day had on Prayer of the Plaintiff before Count, if Defendant makes Default Process shall go to bring him in; but if the Plaintiff had counted, and before Issue the Defendant had made Default, if Plaintiff will demand him, he may have Judgment upon the Default; and I take it to be the same upon Demurrer where Day is given, at which the Defendant makes Default; for there Judgment final shall be, and no Process Ad audiend' Judic'. Vide 18 Ed. 4. 7. And the Book of 20 H. 6. 44. is mistaken by Fitz. for the Book is full, that Judgment must be upon the Default. 44 Ed. 3. 1. After Demurrer in a personal Action, that Process should go Ad audiend' Judic'; but before Demurrer or Issue joined, if Day be given after Pleading, a Default will be peremptory, and Judgment final upon Default; but the Usage now is not to demand them.

When Inquest may be taken by Default, before Count or after, &c.

The Modern Usage.

It is very hard to make a Default at a Day given by the Court on Demurrer peremptory; but here is an Issue as to Part, and a Demurrer as to the other Part, and a Ve. fa. to try the Issue, and inquire of Damages. And Day is given with a Nisi prius, which Day of Nisi prius is in Truth but to try the Issue, and inquire of Damages, but the Day on the Demurrer is Ad audiend' Judic'; so that in Truth the Day given Ad triand' exit', &c. has nothing to do with the Day of Demurrer, and it is not necessary that the Defendant should have a Day on the Writ of Inquiry; so that the Day Ad audiend' Judic' in this Case is the Day of Bank, and the Default at Nisi prius is only to that to which the Defendant had a Day there, that is, to try the Issue, and the taking the Inquest by Default is a Waiver of taking Advantage of Judgment by Default.

Issue to Part, and Demurrer to Part. Co. Lit. 71, 72. Inst. Leg. 567, &c. 2 Saund. 13.

Now do I know where the Plaintiff may in a personal Action take Advantage of a Default upon the Inquest; but where the Defendant pleads a Release or Acquittance, and at Issue makes Default, there indeed he may pray Judgment upon the Default, or that Inquest be taken by Default; but after he takes Inquest

Quod Holt concessit.

by

Vide Stat.
8 & 9 W. 3.
c. 10.
2 Lilly 43.
38.

by Default, he is too late to pray Judgment by Default, for his taking the Inquest is a Waiver of the Judgment by Default; and Judgment must be upon the Verdict, and not upon the Default; that being waived by Prayer of Inquest. Upon an Issue of Non est factum, you cannot take a Judgment by Default.

Holt. The Question first is, Whether if Default be in a personal Action after Declaration, and Day given over, either by Imparlance or any other Day; whether, I say, this be so peremptory that Judgment final ought to be upon that Default? And I think in Case of Imparlance, whether to a Day in the same Term, or another, Judgment final ought to be. 18 Ed. 4. 7. 36 H. 6. 19. & 19 H. 6. are full in the Point, without taking any Difference.

Two Defaults
in Action
real, and but
one in Action
personal.
Cal. temp.
Mac. 379.

Now then upon Demurrer, because Parties are at Issue in Judgment of Court, suppose it had been in real Action, and Cur. adv. vult. Defendant makes Default, Petit Cape must go, and he does not save his Default; shall not Judgment final be given upon the Default? If it be so when there is a Demurrer in a real Action, is it not much stronger in Demurrer in a personal Action? And it is not less peremptory upon Demurrer than Imparlance? For if Default be after Demurrer on Day given in the same Term, it is peremptory; that is, if the Party does not come at such a Day in the same Term, it is a Departure in Despite of the Court; and there in real Action no Petit Cape shall go, but Judgment final shall be on the Demurrer, and not upon the Default; so that if the Book of H. 6. be Law, as sure it is, Judgment is as much to be given upon Default in personal Actions as in real; only that there must be two Defaults in a real Action, and but one in a personal one.

Where Day
is given Pre-
ce Partium
before Decla-
ration, &c.

19 H. 8. 16. If the Party comes in upon Process in a personal Action, or upon Cepi Corpus, or Exigent, and Day is given Prece Partium, that is, by Consent of Parties, at which Day Default is made, no Judgment can be given. Why? Because there is no Declaration. But if it were after Declaration, and at the Day Default had been, it were peremptory. So is the Case of 7 H. 6. 19, 41. One in Custody of the Marshal upon a Præmunire, is charged by Bill in Nature of an Appeal of Mayhem, and Day is by Consent of Parties; at which there was a Default: There could not be Judgment final, because, tho' he had been charged in Custody of the Marshal, yet he never had been in Court; but if the Default there had been upon an Imparlance, it had been peremptory, and final Judgment had been thereupon. Indeed in Annuity, which, tho' personal, yet partakes of the Nature of a real Action, (for there is final Judgment given to recover an Inheritance, and the Process in Annuity therefore imitates that of a real Action) after Default there shall be a Distringas ad audiend' Judic' to afford the Defendant an Opportunity to save his Default; because tho' the Recovery shall charge the Person only, yet it may be of an Inheritance. So in a Secta ad Molendin', if Defendant make Default, there shall be a Distringas to give him Liberty to save his Default; for that also follows the Nature of a real Action, as being of Freehold or Inheritance. F. N. B. 123. D.

Appeal.

Annuity.
Co. Lit. 144.
b.

Secta ad Mo-
lendum.

Ap,

Ay, but this is like an Enquiry of Damages. 1. If Judgment be against a Defendant, and an Enquiry of Damages, he has no Day given him thereupon, and therefore he can make no Default; for the Court have already given their Judgment against him, and he thereby is quite out of Court, and the Enquiry is only to ascertain the Damages. But where there is both Issue and Demurrer, and before Judgment on the Demurrer a Ve. fa. goes to try Issue, and inquire of Damages, whereupon Defendant has Day, on which he makes Default; Is not that a Default to the Day of Demurrer as well as of Issue? For tho' they be in Truth different, viz. one the Day of Nisi prius, and the other the Day in Bank; yet in Consideration of Law they are the same. If there be two Defendants who plead severally, one of them demurs, and Judgment is given against him before Issue joined with the other, then he against whom the Judgment passed has no Day in Court, yet the Plaintiff may continue Process against the other; but if in that Case the Issue were to be tried before Judgment, then the Defendant who demurred has a Day, and that is the same that the other has by the Nisi prius; which by Law is the same with the Day in Bank. A Default in a real Action at the Day of Nisi prius is the same as at a Day in Bank, and as fatal; for they are not to be severed. And why not so in a personal Action? And it is incident to the Trial of the Issue, to inquire of the Damages upon the other Issue in Law. So if the Day of Nisi prius be the same with the Day in Bank, the two have the same Day; but here, tho' it be one Defendant, yet you would have him be out of Court as to Issue, by Reason of Default at Nisi prius, and in Court upon the Demurrer in the Day in Bank; that is, in and out of Court the same Day.

Diversity
 where only
 Enquiry of
 Damages, and
 where both
 Issue and
 Demurrer.
 Cas. temp.
 Mac. 274.

If there be Default after Demurrer joined, Judgment shall be upon the Default, or upon the Demurrer; and when Continuance is given, the Appearance of both Parties are entered at the Continuance-day, and antiently they used to demand the Parties; so then they lay at Lurch for one another; but now these are Things of Course.

Judgment up-
 on Default
 after Demurres
 joined, &c.

And whereas my Brother Powell affirms, that there can be no Day on the Demurrer but the Day in Bank: I would suppose there are two Defendants, one pleads to Demurrer, and the other pleads to Issue, and Ve. fa. goes to try the Issue, and inquire of contingent Damages; before the Day of Nisi prius and Puis darrein continuance, a Release is made by the Plaintiff to the Defendant that demurred; Can he plead it at Nisi prius? And if he fails in doing it, Can he plead it in Bank at a Day there? and Powell subito allowed he might plead it at Nisi prius, but not in Bank; but after seemed to doubt, Whether after Demurrer a Plea Puis darrein continuance could be pleaded?

Vide Hob. 81.

Vide Post 102.

If at a Day given upon a Writ of Error Defendant makes Default, the Writ of Error may go on, and the Judgment be affirmed; because it is no new Judgment that is given for the Defendant, who is now out of Court by his Default, but only his former Judgment affirmed and ratified: But in that Case it

D

were

A Man out of Court may have Judgment against him, tho' not for him.

were hard to give the Defendant Costs upon the Statute: So if a Defendant make a Default, Plaintiff may have Judgment; for a Man that is out of Court may have a Judgment given against him, tho' not for him: And he wished the Defendant's Counsel to take Care how they made Default; for after Default, tho' the Plaintiff could not prove his Declaration, so as Verdict could be for him; yet it were very hard to give the Defendant a Judgment, for he was out of Court.

If the Defendant confesses the Trespass, but offers good Matter, if well pleaded.

Vide Hob. 69.
1 Salk. 173.

Hard to hold the Defendant to his Confession.

Aliter, Where the Matter confessed would not bar the Plaintiff.

Ld. Raym.
18.

Caf. temp.

An. 2, 227, 273. Caf. temp. Mac. 147, 148. Comyns 548. 2 Barnes 206. Stra. 873.

At another Day another Point stirred in this Case, was, Whether Judgment might not be given against the Defendant upon the Issue, tho' looked upon as immaterial, and a Jeofail? Because the Defendant confessed the Trespass in his Plea, and made no good Justification: So (as was urged) Judgment ought to be given against him by Confession. And herein Ch. J. Holt took a Diversity: If one confesses the Cause of Action, but pleads Matter, which, if well pleaded, would bar the Plaintiff, there it were hard to hold the Defendant to such Confession, and give Judgment against him; as here the Defendant indeed confesses the Trespass, but offers such Matter, as, if true and well pleaded, would justify him: But where the Fact is confessed, and such Matter of Justification offered, which, tho' never so true and well pleaded, would not bar the Plaintiff; there Judgment may be upon the Confession; as in an Action for Words for calling the Plaintiff a Chief: Defendant justifies, for that the Plaintiff received a Chief, and pleads it ill; there Judgment may be upon the Confession, for that Matter could not have been so pleaded, as to have justified the Words.

Two Defendants sever in Pleas, &c. so as there can be no Repleader.

When the Acquittal of one Trespasser shall discharge the other.

Hob. 54.

Ld. Raym.

601, 717,

602, 1372.

Caf. temp.

Mac. 251.

Stra. 420.

Where one of the Defendant's Plea entirely destroys the Plaintiff's Action.

In the further Debate of this Case, the Court held, That if there be two Defendants who sever in Pleas, and one is found guilty, and an Issue not helped by the Statute of Jeofails is tried for the other, who having made Default, is out of Court; so as there can be no Repleader, and of Consequence the Judgment must be to quash the Writ or Bill, it necessarily shall be abated thereby as to the other; for tho' one Defendant may be acquitted in Part, and condemned in Part of a Trespass, or one of two condemned, and the other acquitted, yet the Writ cannot abate as to one, and subsist as to the other; and as to Trespass against two, when the Acquittal or Discharge of one shall discharge the other, vide 2 Cro. 134. Trespass against two for taking Gun and Dagger, one justifies the Taking in his own Defence, being assaulted by the Plaintiff, the other pleads Not guilty, and is found guilty, and Damages against him, and the other Issue is found for the Defendant; there Judgment shall be against him that is found guilty, for the other's Plea does not destroy the Plaintiff's Title for good and all: But if Trespass be against two for taking the Plaintiff's Goods; and one pleads Not guilty, and is found guilty, and the other justifies the Taking by Gift, &c. and his Plea is found true; there, forasmuch as the Defendant's Plea entirely destroyed the Plaintiff's Cause of Action, he shall have Judgment against neither.

But the last Day of Hillary Term following, the whole Court declared, that they were of Opinion, that the Issue was helped by the Statute of Jeofails, and for so much gave Judgment for the Defendant; and as to the Demurrer, gave Judgment for the Plaintiff without any Reason. Vide 2 Saund. 318, 319. 2 Keb. 750, 769, 789, 825.

Domina Regina *versus* Foxby. Vide post 178, 213, 239.

A Woman was convicted upon an Indictment for being a common Scold; and Mountague, in Trinity Term before, moved an Arrest of Judgment, That the Indictment was, That she was Communis Calumniatrix, which is not the Latin Word for a Scold, but Rixatrix; and upon this Exception, Judgment was arrested this Term. Vide 2 Rol. Abr. 79. K. & Faresl. 52. Blackerby's Cases 217.

In an Indictment, Calumniatrix for Rixatrix. Vide post 178, 213, 239, 311. Judgment arrested.

Note; The Punishment of a Scold is Ducking; and Holt, when the Exception was first made, said, It were better Ducking in a Trinity than in a Michaelmas Term.

Note; One cannot move to stay Proceedings upon a Bond upon Payment of Principal, Interest and Costs, till Bail be put in; for till then the Parties are not in Court. (But see the late Act for Amendment of the Law, 4 & 5 Ann. cap. 16.) Vide Faresl. 114, 140. Post 25, 60, 101, &c.

Bail before Motion, to stay Proceedings. Stra. 419, 781, 877.

Trantor *versus* Watson.

A Captain of a Ship was taken in his Homeward Voyage from Jamaica by a French Privateer, and being under Capture, compelled for the Ship's Ransom with the Frenchman, sends the Ship home, and goes himself with the Captain into France for his Security: After the Ship arrived here, and the Goods had paid Custom, and were brought from on Board, and put into Trantor's Custody, the Defendant seized them by Process of the Admiralty to force an Appearance in quadam Causa Salvagii; and Brotherick before Appearance moved for a Prohibition, and cited Captain Sand's Case in King William's Time, where after great Deliberation the Court granted a Prohibition before Appearance: But Holt said, That that Case was nothing like this, for that was a Process in Nature of an Embargo on a Ship from going to the East Indies, grounded upon Letters Patent of King Charles II. to the East India Company, and the Seizure there was the ultimate End of that Process, and it was not to answer why they did go, but to stop them from going; but the Process here is to force an Appearance: But at last the Court ordered him to give Notice within a Day or two, and Things to stay till then. And at another Day Darnell moved to discharge the Rule, and said, This was a Case of Salvage; and as the Master has Power to pawn the Ship upon extraordinary Occasion, so he may in this Case subject Part of the Ship and Cargo to save the Whole; so the whole Question will be, Whether the Court of Admiralty can compel Payment of this Composition? For if they have

Ld. Raym. 931. S. C. 1 Salk. 35.

Vide post 25, 79, 162, &c. If Prohibition lies before Appearance, to stay Process of the Admiralty in quadam Causa Salvagii. 1 Salk. 35. Capt. Sand's Case cited.

3 Lev. 351. 4 Mod. 176. Ld. Raym. 442, 22, 152, 272, 446, 577, 578, 650, 80, 893, 936, 982, 984, 983, 1044, 1206, 1211, 1247, 1248, 1285, 1453.

Cal. temp. W. 3. 16, 134, 135, 143, 244, 246, 405, 406, 408, 409, 440, 442, 511, 526.

Conuzance

Cal. temp. An. 5. 30, 31. 2 Wms. 367. Stra. 695, 761, 890.

Conuzance of that Matter, the Executing the Process on Land will not vitiate it, if they have original Jurisdiction: As if a Ship be taken as Prize, and condemned, and the Goods sold; and after the first Owner sues the Vendee for the Goods, he may sue him in the Admiralty; so in Case of Piracy; for the Question will be Piracy or Prize. Cro. Eliz. 685. 2 Saund. 259. 1 Sid. 320. 2 Lev. 25. 1 Lev. 243. 1 Vent. 173, 174, 308.

Argument
for Prohibi-
tion before
Appearance.

Brotherick insisted upon these Things: 1. That his coming before Appearance could not be objected to, for the Process was a Seizure of the Goods in order to a Condemnation, if by such a Time Security be not given to answer for the Goods in Case they be condemned; and suppose the Owner of the Goods live at Jamaica, and their Process is to forfeit the Goods if Appearance be not in three Days, would not this Court grant a Prohibition in that Case? 2. It is too weighty a Point for the Admiralty to determine, Whether the Master may ransom the Ship from Captors? And this is what will open a Way to Cowardice, and Cheating of Owners. 3. Tho' the Captain may on Occasion hypothecate the Ship, he cannot hypothecate the Goods. 4. In Cases of Hypothecation, the Party to whom it is made, and not the Party who does hypothecate, sues.

If the Master
may ransom
from Captors.

If he may
hypothecate
both Ship
and Goods.
Vide post 79.

Whether the
Master may
not compound
for a Ransom,
as well as
throw Goods
over-board.
Vide 1 Salk.
3, 34, 35, 424.
Post 79, 162.
1 Sid. 418.
1 Vent. 32.
1 Lev. 267.
Vide Hob. 12,
42, 115.
8 Co. 147.

Ch. J. Holt. The Master has Care of the Ship, and all the Goods on Board it; and here he being under Capture in an Enemy's Hands, and no hopes of a Retaking, the Question is, Whether a Master under these Circumstances may not compound for a Ransom, as well as he may throw Goods over-board in Case of a Tempest? As to the Objection, That such Compositions prevent Retaking; it is true, a Ship retaken upon fresh Pursuit, tho' after a Week's Time, shall be the first Owners: But alas! a Retaking is so foreign a Supposition as deserves but little Consideration. If he then has a Power to ransom the Goods, the Question next will be, Whether he may retain them as his Security? It may be not; or if he might, and parts with them once, probably he cannot retake them; as in Case of Freight, he may detain them till paid; but if once he suffers them out of his Possession, he may not retake them: Then the Question will come to this, Whether in case it appears to us that this Process of theirs be illegal? as suppose here, instead of attaching the Goods in the Ship, they had attached Cows or Horses, or Household-Goods, to compel an Appearance in this Case? And I doubt whether they can attach any other Goods to enforce an Appearance, but the very Goods they proceed against: If we be then of Opinion that they cannot attach other Goods, or that they cannot retake these Goods, suppose in the Hands of a Vendee, ought we not, I say, in such a Case, tho' we rarely do it, grant a Prohibition?

Copy of a
Libel upon a
Motion.

Powell. Regularly when one moves for a Prohibition, he ought to have a Copy of the Libel; and if in any Case the Admiralty can issue Process against Goods, it is hard to suppose this an illegal Process; and without we do so, we cannot prohibit them: The Process is to seize the Ship and Goods there, &c. in quadam Causa Salvagii; and

and Execution is suggested to be of the Goods after they were taken out of the Ship, in the Hands of another Person: And if a Ship be hypothecated, in whose Hands soever it comes, it is liable; therefore if Goods may be hypothecated, it will be the same; and if you have good Cause of Prohibition, giving Security will not hurt you; and if the Execution be what Process does not warrant, you have your Remedy against the Officer.

The next Day Dr. Lane, a Civilian, came to maintain their Process; and said, That Redemption is a Species of Salvage, which is to rescue by Force, or redeem by Money. He said, The Master of a Ship represents the Owner and Freightors; and if he has Suspicion, may detain the Goods for his Freight: But it is objected, if once he parted with them, he cannot by Process retake: But we say he may; for in this Case he has not only single Possession, but also an Hypothecation of the Goods: This is a Case of Redemption of Goods in the Power of an Enemy, whereof in some Respect they had a Property, and might by the Law of Nations sink and destroy them; so that this Redemption is a prudent new buying of the Goods for the Advantage of the Freightors, by one that by the Law and Custom of Nations (for it is not by the Rhodian or Civil Law) ought to redeem for the Conveniency of Merchants, and Advancement of Trade; and here the Master has actually paid the Composition by his Body, which he subjects to Captivity till it be paid; so that he thereby gains a Right and Interest in the Goods as in Goods hypothecated to him, which Right follows them in whose Hands soever they go.

Argument for to maintain the Process and the Redemption, and a Retaking the Goods, &c.

By Law and Custom of Nations.

Here the Court interrupted him, and said, The Merits of the Cause was not before them, before Appearance and Pleading; and it seems very reasonable, that a Master compounding for Goods under these Circumstances, should be satisfied by the Owners, &c. and it is so in Case of Pirates; a fortiori, it ought to be in Case of Capture by lawful Enemies; besides, we are upon a Process before Libel; and if the Process be unlawful, you have a double Remedy by Law, viz. Trespass or Replevin. And the Case of Captain Sands was an Action upon the Statute after the Ship was stayed; and it is too early for us upon Motion before Appearance or Libel, to determine the Right of their Process; and a Citation is a Suit within the Statute, for which Action lies against them upon the Statute, if they have not Jurisdiction of the Matter.

Before Appearance, &c. Cause is not before the Court.

1 Salk. 31.

3 Lev. 351.

4 Mod. 176.

Powell Justice added; This was only a bare Process against Ship and Goods in Causa Salvagii, and we will not dispute the Legality of it upon Motion, since you have your proper Remedy, if it be illegal. And so per tot' Cur', the Rule was discharged. For other Matters touching the Admiralty, &c. vide post 25, 79, 162, 238. Carth. 26, 32, 166, 294, 398, 423, 474, 518. Skin. 59, 93, 230, 334, 361, &c.

Rule discharged per Cur'.

Bangley *versus* Titcombe.

As to Special
Bail, and No-
tice in Trover,
&c.
Vide 1 Salk.
98, 99, 102.
Vide 2 Salk.
608.

NOTE; There must be Special Bail in Trover: Exception was to Bail, and new Bail put in, and new Exception to them, but no Notice thereof; If Notice be necessary, was the Doubt in Practice: And another Doubt was, if the same Bail taken by the Sheriff be put into Action, if they may be excepted against.

Dillon *versus* Brown.

Upon War-
rant to confess
Judgment, and
an Agreement
to stay Execu-
tion for a Year.
Vide post 16,
288.
1 Salk. 258,
322.

2. How the
Year to be
reckoned.
Ld. Raym.
281, 480.

BRowne gave a Warrant of Attorney to Dillon to confess a Judgment to him, and after Execution sued out thereupon, it was moved to be set aside for Irregularity; upon Suggestion, that it was agreed between the Parties at the Execution thereof, That no Execution should be taken out till a Year after. The Court did reflect upon a Gentleman at the Bar, who was said to be advised with in the Transaction, because the Agreement was not by Deed; but the Plaintiff insisted on it, that he had stayed a Year, for the Warrant was in a long Vacation, and the Judgment was entered as of Trinity Term before, and the Execution was not executed till after Trinity Term following: So the Plaintiff had waited a Year from the Judgment entered; but the Court was not agreed, Whether in such Case the Year was to be reckoned from the Date of the Judgment, or of the Warrant? And the Matter of Fact being referred to Mr. Clerke, he reported, That there was no such Agreement made at the Time of the Warrant given; so the Execution stood. But Quære, If in this Case Execution be delayed till after the Year, a Sci. fa. be not necessary, notwithstanding the Parol Agreement? Vide Salk. 322. that it is necessary, though Execution be stayed by Injunction; and vide ibid. 258. and Faresl. 64, 65, & post 288.

Jose *versus* Mills.

2 Salk. 640.
S. C.
Ld. Raym.
890. S. C.
Trespas for
taking Cows
at D. and other
his Goods.
Non Cul' to
Part, and ju-
stifies for the
Residue.

IN Trespas for taking away two Cows, and several Loads of Wheat, out of the Plaintiff's Close in Dale, ac etiam for taking away several other Things de Bonis propriis of the Plaintiff, ibidem similiter invent'. Defendant pleads Not guilty as to the two Cows, and pleads a special Plea to the Residue; to which the Plaintiff demurs: Issue being first tried, the Defendant is found Not guilty, and contingent Damages entirely assessed upon the Demurrer: And in Michaelmas was Twelve-month, when Branthwaite found the Court against him upon the Demurrer, he took this Exception, That Damages were entirely assessed; and yet for some of the Things, viz. the Loads of Wheat, they did not appear to be his Goods; for the Words de Bonis propriis of the Plaintiff, shall only go to such Things as are after the ac etiam; for the Goods in the first Clause are sufficiently described by giving them a Venue; and tho' there be but one Cepit for both, that will not alter the Case; for one Verb may as congruously govern both Clauses when the Property of the Goods belongs to several Persons as when to one, so that the Verb does not

distribute

distribute the Words de Bonis of the Plaintiff; and if the Fact were that the Goods mentioned in the first Clause had been the Goods of a Stranger, this had been a good Declaration; and for Authorities he quoted 2 Saund. 379. where the Plaintiff declared upon the Statute of Hue and Cry, that Certain Persons, to him unknown, did assault him, and took 10l. of the Goods of him the Plaintiff, and several other Goods in particular out of his Possession took; and held he should recover for no more than what he expressly laid to be his Goods, and that what he did not lay to be his own, should be understood to be the Goods of a Stranger. 2 Lev. 156. Quare Clausum fregit of the Plaintiff, and twenty Load of Hay ibid' invent' took away: After Verdict, Judgment arrested, because not laid that the Hay was the Plaintiff's. 3 Bulst. 303. 3 Keb. 524.

He shall recover for no more than his own Goods.

Ward contra quoted 2 Rol. Abr. 250. pl. 7. Trespass quare Defendant apud Dale Clausum suum fregit & intravit & solum Querentis ad tunc & ibidem effodit & mille carectat. soli ad Valenc. 10l. & 100 Pecias Maremii ipsius Quer' ad Valenc' 200l. ad tunc & ibidem inventas cepit: Held that ipsius Querentis should go to carect. soli, as well as to Pecias Maremii; and he quoted the Writ in the Register, quare liberam Warennam of Plaintiff fregit & Cuniculos cepit, without saying suos. 02 in ea, 43 Ed. 3. 13. Mo. 691. Cro. Eliz. 568. Trover for 40s. in Honey in a certain Purse, as for his proper Goods, without saying the Purse was his; yet after intire Damages, and the Exception moved in Arrest of Judgment, Plaintiff had Judgment; which last Case the Court immediately agreed to be Law; for the Purse shall necessarily be intended to be his whose the Honey was: And tho' the Chief Justice held the Exception fatal, yet the rest would be advised; and the Case being stirred again in Trinity Term, all the Court held the Exception fatal, and said the Case was no more than this: Plaintiff in Trespass declares, that the Defendant took away two Cows from his Land in Dale, and also two Horses of the Goods of the Plaintiff from the said Dale; so that laying a Venue for the taking of the two Cows closes up the Sentence, and interrupts it, being coupled with the 2d Sentence, or the Matter of Description which follows; and the Plea does not confess them to be the Goods of the Plaintiff, for that only justifies the Taking; which might well be, tho' they were the Cattle of a Stranger, and relied on Raym. 395. & 2 Lev. 156. And the Case of 2 Rol. Abr. 250. was agreed for good Law, but not like this, for there was but one Venue for both; and then the Question was, Whether the Judgment should be for the Defendant for all, in which Case he must have full Costs, or only for Defendant upon the Issue, and a Nil capiat per Billam upon the whole Demurrer, so as the Plaintiff should not be finally barred, but might begin de novo? For if it were not for the Intirety of Damages upon the Demurrer, the Defendant should have Judgment for what was ill declared, and the Plaintiff for the rest; and now this Term the Court gave Judgment final for the Defendant upon the Issue; and as to the whole Demurrer, Nil capiat per Billam quia Narratio præd. minus sufficiens, &c. that is such a Judgment as is upon an Arrest of Judgment.

Vide 11 Co. 116, 117.

Per Cur' the Exception held fatal.

Vide Hob. 82.

2 Cro. 46, 47. Yelv. 36.

3 Bulst. 303. Vide 2 Lev. 20.

Judgment upon an Attorney's appearing without a Warrant.

Post 42, 86.

Vide 1 Salk.

86. S. C. 88.

1 Barnes 159, 160.

2 Barnes 39, 290.

If an able and responsible Attorney appear for another without a Warrant, and Judgment is against him, Judgment shall stand, and the Party shall be put to his Action against the Attorney; but if the Attorney be a Beggar, or in a suspicious Condition, the Court will set aside the Judgment.

5 Mod. 205. Cal. temp. W. 3. 440, 583, 666, 318. Cal. temp. Mac. 45. Fitz G. 191, 192.

Post 73 Saunders v. Melhuish.

Holderstafte *versus* Saunders.

Motion for an Attachment against an Attorney for procuring one to be turned out of quiet Possession. Post 73. Vide Savil 31. 1 Mod. Cal. in L. & Eq. 109.

Serjeant Hooper moved for an Attachment against an Attorney and some more, who had got one in quiet Possession turned out, thus: He got one to come upon the Land, who assumed the Name of the Tenant in Possession, and owned himself to be the Man, and got the common Affidavit of Service to him by the borrowed Name, as Tenant in Possession, having delivered a Declaration to him before, and thereupon got Judgment against the casual Ejector, and turned the Tenant, who was wholly ignorant of all, out of Possession. Upon Affidavit of this Matter, all the Accompllices were ordered to attend; for tho' the Court looked upon it as a very great Offence, they would not at first grant an Attachment; but said, that it being in a criminal Matter, if Endeavours were used to serve them with the Rule, and they could not be found, upon Affidavit of that Matter, they would grant an Attachment, without requiring personal Service. Then Serjeant Hooper insisted to have it Part of the Rule, That they should not move for an Injunction in Chancery in the mean Time, for that would hinder the further Inquiry of this Practice: But the Court said, they could not do that, for that were to send an Injunction into Chancery; but said, when the Court had a Bank over a Man, and he came for a Favour to the Court, they often refuse to grant him that, without he consented not to go into Chancery; and that if after such Consent he would go, they would send an Attachment against him for Contempt.

Practice of the Court, if an Offender crave for a Favour.

If the Chancery should grant an Injunction in the mean Time.

And Ch. J. Holt said, Sure Chancery would not grant an Injunction in a criminal Matter under Examination in this Court; and if they did, this Court would break it, and protect any that would proceed in Contempt of it; and he said, he thought that a Copy of these Affidavits upon which the Rule was made here, and an Oath of their being a true Copy, ought to be Ground sufficient to stay the Chancery from granting an Injunction.

Attachment of Privilege by Marshal. Confessing an Indictment.

In an Attachment of Privilege by the Marshal, he shall have no Attorney, because present in Court.

A Clerk in Court may confess an Indictment for his Client. Ante 14.

Cornish *versus* Marks.

IF Feme Covert be arrested, let Cause of Action be what it will, she shall be discharged upon common Bail; but if the Husband be arrested, he shall not be discharged by giving Bail for himself, without giving of it for his Wife likewise.

Vide 1 Salk.
115.
Caf. temp.
W. 3. 444.
1 Barnes 59.
Farell. 10.
1 Lev. 1.
1 Mod. 8.

Postea 105. Common Bail for Feme Covert.

The Queen *versus* Bothell (or Porter.)

DEfendant was convicted upon an Indictment before Justices of the Peace, and not being present, no Judgment could be given, but a Capias pro fine awarded; and then he by a Certiorari removed up the Conviction, and the Attorney General moved for a Procedendo: 1st, Because he said, Certiorari's usually went to remove Indictments, &c. before Trial, but not to remove Convictions; for the Consequence of that would be mischievous, that this Court, which having not tried the Cause, could not be truly apprised of its Nature, should set the Fine, which ought by Law to bear some Proportion to quantitat' delicti: But Brotherick first said, It was very frequent to remove Convictions before Judgment, and that in this Case there could be no Inconvenience in Point of setting the Fine; for it being upon 14 Car. 2. — the Fine is ascertained thereby, viz. a Year's Imprisonment, &c.

1 Salk. 149.
vide ib. 150.
& post 33.
40, 43, 61,
83. S. C.
Attorney General moved for a Procedendo upon a Conviction, removed by Certiorari upon an Indictment before Justices of the Peace, upon the Stat. 14 Car. 2. for abusing a Custom-house Officer.
1 Mod. Caf.

in L. & Eq. 319, 320. Ld. Raym. 991, 1375.

Ch. J. Holt. Certiorari goes every Day to remove Convictions, of which Writ of Error doth not lie, for that is the Party's only Remedy, and the Reason regularly why Convictions are removed by Certiorari; but Certiorari's have also gone where Writ of Error would have lain, to remove a Conviction, as to plead a Pardon, or other special Reason: And he remembred a Case in Chief Justice Scrogg's Time, where a Certiorari was sent out of this Court to remove a Conviction upon an Indictment before Judges of Assize, and that the Court gave Judgment: It was for Words, and there a Writ of Error would have lain; for where-ever a Conviction is upon an Indictment, a Writ of Error will lie thereof: And he said, The Course of the Crown-Office was to remove Judgments of Attainder, &c. by Certiorari, and being a Writ of Error Coram nobis; and so it was in the Case of Mr. Hambden, and several others: But here being no such special Reason in this Case, let Procedendo go. And here the Court said, That where a Statute takes Notice of a Common Offence, and adds a further Penalty, an Indictment thereupon may well be laid to be contra form' Stat'. And where the Act gives Justices Power generally to determine a Matter at the Sessions, it must be according to Law, and as a Court. Vide 1 Vent. 33, 39, 171.

Vide 1 Vent.
33, 171.
1 Sid. 419.
Certiorari where Error doth not lie, &c.
1 Cro. 314,
377.
Caf. temp.
W. 3. 390,
403.
Course of the Crown-Office to remove Judgments in Attainder.
1 Salk. 150.
Procedendo granted.
2 Sid. 32.
Indictment contra form' Stat'.

Post 275.
Mistakes in
filing Records
rectified.
Stra. 141,
833, 261,
1077.

In the Case of the Queen and Warden of the Fleet, the Record of Issue and Pleading coming hither in Hil. 11 W. 3. was through Mistake put upon the File of Michaelmas Term, but ordered to be put on the right File, the Mistake appearing plain to the Court: And Powell quoted two Cases where Venires were to wrong Records, but set right by the Court. Vide the Case of the Queen and Tutchin, post 164, 268.

White's Case.

Ld. Raym.
1004, 959,
989, 1334.
S. C.
Where a
Mandamus
ought to go
to restore to
an Office, &c.
5 Mod. 404,
452.
1 Vent. 82,
331.
Remedy if
a private Of-
fice, and a
Freehold. Postea 82.

DEE moved for a Mandamus to restore White to the Place of Clerk to the Company of Butchers in London; it being alledged, That this was a Charter-Office, in which the Party had a Freehold; and quoted the Case of an Attorney of an inferior Court, where it goes. But Holt, C. J. That Case differs; 1. Office of Attorney concerns the Publick, for it is for Administration of Justice. 2. He has no other Remedy, but yours is altogether Private; and if it be a Freehold, you may have an Assise of Case; and Mandamus ought not to go where the Office is private, or Party may have an Assise; indeed it has gone for Register in an Ecclesiastical Court, but against my Will.

Postea 82. Cas. temp. W. 3. 190, 609, 666. Cas. temp. An. 214, 221. Cas. temp. Mac. 50.
1 Mod. Cas. in L. & Eq. 148. Fitz-G. 123, 124, 194, 195. Stra. 159, 557, 797, 1082, 608, 696, 832,
893, 895.

Vide 2 Salk.
457, 645, &
650.
Post 57.
1 Mod. 1.
Rule of No-
tice of Trial
where Issue is
join'd four
Terms, and
no Proceed-
ings by the
Plaintiff.

Notice how
to be reckon-
ed.

When such
Notice is
counter-
manded.

Antient Rule
of fourteen
Days Notice
to be ob-
served.

If a Cause
sleeps four
Terms be-
fore Issue
joined, &c.

Note; It is a Rule of the Court, That if Issue be joined four Terms, and no Proceedings thereupon by the Plaintiff, there ought to be a Term's Notice before Trial: And a Case happened, that Issue was joined in Trinity Term, and Notice of Trial in Hilary Term; but after countermanded, and a new Notice in Trinity Term after, and the Issue tried at the Assises; and it was now moved to set aside the Verdict as irregularly obtained: And the first Question was, Whether the Term of which Issue was joined should be reckoned one of the four Terms? For if it should, this Trial were irregular; in case the Notice in Hilary Term were not to be looked upon as a Proceeding, then the Trial had been irregular, and as such ought to be set aside: And per Clericos omnes, The Term of which the Issue is joined, is not to be reckoned one of the four Terms; and per eosdem, Notice of Trial any Time within the Year, though after countermanded, is sufficient Proceedings to bring the Plaintiff out of the Rule; for the End of the Rule is, That the Defendant should be put in mind of the Cause, which a Notice, though countermanded, does. It was also held by Court and Clerks, that the right and antient Course was, That if the Assises happened within fourteen Days after Term, fourteen Days Notice was not requisite; but where it could be, it ought to be; that is, where the Assises did not happen within fourteen Days; but it was agreed now, they used to give but eight Days Notice of Trial, though the Cause lay ever so remote; which the Court said was very mischievous, and therefore it was ordered to observe the old Rule.

If a Cause sleeps four Terms before Issue joined, there must be a Term's Notice before Judgment can be signed: If after Issue joined, there must be like Notice before Trial; but to make the Notice regular within the four Terms, it must be within the last Term sedente Cur'. Vide Ashwin and Corbit's Case, 2 Salk. 650, & post 57.

Crowder *versus* Oldfield.

UPON a Writ of Error from the Common B. the Case was this: The Plaintiff in Case, for hindring him of his Common, declared, That he was seised of a Messuage, and ten Acres of Land, cum pertin' in N. in Com' Ebor', Parcel of the Manor of N. in the same County, and that he held them by Copy of Court-Roll of that Manor as a customary Tenant in Fee-simple, according to the Custom of the said Manor; and that he the Plaintiff had, and ought to have, &c. and all the customary Tenants of his said Tenement, with the Appurtenances, by the aforesaid Custom, præd' a tempore cujus, &c. used and approved, had and ought to have a Common of Pasture in a certain Pasture or Moor called W. Parcel of the said Manor, and containing forty Acres in N. præd', for all his commonable Cattle upon the said customary Tenement, levant and couchant, &c. as appurtenant to his said Tenement; that the Defendant at such a Time, with Intent to deprive him of his said Common, did enclose Parcel of the said Place, &c. Not guilty: Verdict for the Plaintiff, and Judgment arrested in Common Bench: 1. Because he made a Title by Custom, and did not shew that he was a Copyholder; for he did not shew he held ad voluntat' Domini.

Lutwyche junior, for the Plaintiff in Error; That none can claim Common by Custom generally, but a Copyholder; and he ought in making Title to shew his Estate to be a Copyhold, that is, demised and demisable, and held ad voluntatem Domini, &c. 4 Co. 31. But this is an Action upon the Case against a Stranger, and upon the Possession. 2. It is after Verdict; the laying a Custom is in this Case only an Inducement to the Action, and Inducements need only be set out in Substance, for the Wrong done to our Possession is the Gift of the Action: And he quoted 1 Cro. 137, 575. 2 Cro. 43. 3 Cro. 419. 1 Vent. 319, 275. & Mich. 7 W. & M. Stroud and Bird. And though it be laid by Way of Custom, and ill as such, it may be well by Prescription, according to Hob. 86. Owen 109. In Case, the Plaintiff declared that B. demised him all his Fairs for twenty-one Years, that the Defendant hindred him of taking his Toll; and though it was excepted, that he had not laid any Title to B. yet because it was upon the Possession, in which the Right did not come in Question, Plaintiff had Judgment.

2 Lev. 193. Case for Disturbance of a Seat in the Church, without saying it was an antient one, and the Exception over-ruled, because against a Wrong-doer upon the Possession.

2 Jo. 227. 1 Lev. 277. 3 Cro. 335. Case was for Disturbance in an Office, to which the Plaintiff made a Special Title, and the Jury found a Title variant; yet Plaintiff had Judgment, because the Title was not material.

Verdict

1 Salk. 170,
364, 365.
S. C.
Ld. Raym.
1225. S. C.
Error in Case
by a custo-
mary Tenant,
for inclosing
the Common.
9 Skin. 406.

Custom.
Carth. 432.
Vide ib. 83,
270.
Post 63.
Ld. Raym.
386, 406,
407, 1145,
1231.
Cas. temp.
W. 3. 35.
Non Cul',
Verdict pro
Quer', and
Judgment
arrested.

Claim of
Common by
Custom.
Vide Co. 60.
Carth. 432.

Inducement
to an Action
on the Case.
4 Mod. 418.
Vide post 21,
313.

Narr' upon
the Possession.

Supplied by
Verdict.
2 Salk. 459,
460.
Post 313, 314.

2 Salk. 437.

That the Te-
nant has made
himself a
Freeholder.

1 Cro. 185,
229.

And that the
Verdict can-
not help it.

The Question
in the Case.
Post 5 Mod.
244, 378.
1 Inst. 58.

Hob. 86,
286.
1 Jo. 276,
287.

The Declara-
tion repug-
nant.
Hob. 86.

What the
Plaintiff
should have
shewed, &c.

Verdict will supply whatever must of Necessity have been proved at the Trial; and quoted Roswell and Pryor's Case, Trin. 10 W. in Dulance for stopping of Lights, it was not said to have been an antient Bessuage, yet held well after Verdict: Besides, the Locus ad quem here is said to be Parcel of the Manor, which the Freehold is not, and Copyhold is; for the Services whereby the Freehold is holden, is that which is Part of the Manor, and not the Freehold itself; and for this he quoted Mich. 9. of the late King William, Winter versus Lowdurr, Br. Maner' 2. 2 Vent. 18. Vide Raym. 101. 2 Keb. 410, 493, 504.

Parker contra. This Case has been three Times solemnly argued in Com' Banc', and the whole Court unanimous in their Opinion against the Plaintiff; for as he has made his Case, he has a Freehold in the Locus ad quem, for Tenant of Land secundum cons' Manerii, shall be understood a Freeholder: 2 Vent. 143, 144. 9 H. 6. 29. 4 Co. 31. b. Foiston's Case, 2 Leon. 29. Vaugh. 253.

Then Verdict cannot help it; for where the Title is inconsistent, Verdict cannot mend it; and the Question here is, Whether a Tenant of a Freehold, holden of a Manor, may by Custom have Common in Parcel of the Manor? 1 Cro. 418, 419. 3 Cro. 180.

Holt Ch. J. The Question first is, Whether we shall understand this customary Estate, as pleaded, to be a Copyhold Estate? Of Right you should not only have shewed, that it was by Custom held at the Will of the Lord, but also demised and demisable by him to hold of him, &c. Indeed, you say, it is Part of the Manor, which is a kind of an Implication that it is a Copyhold; and take it so, you have gone, in making Title, by Way of a Que Estate, that all the customary Tenants of that Bessuage, &c. used to have Common there; and that is a good Way of prescribing, though it be not the usual Way; then you say you ought to have it, as belonging to the Land; but if it be look'd upon as a Copyhold, it is not so, but it belongs to it as it is a Copyhold Estate; and if the Copyhold be infranchised, there is an End of the Common: So that it being alledged by Custom, it is not a Common belonging to the Land, but to the State of the Land. Vide Yelv. 189, 119. Massam versus Hunter, Cro. Jac. 253. and Abundance of other Books; but a Copyholder may have Common as appendant to the Land. If Copyholder of one Manor has Common in Waste of another Manor, then he must prescribe in the Name of his Lord, and say, that the Lord of that Manor, whereof he is Copyholder, used, Time out of Mind, to have Common for him and his Copyholders; and there Infranchisement of Copyhold does not extinguish the Common, but it is a derivative Right which the Copyholder has: So if this be taken as appendant to Land, Infranchisement will not extinguish it, so your Declaration is repugnant, for you have averred it to be Parcel of the Manor, and so by Implication a Copyhold; and then your Title you shew is very bad, and such as a Copyholder cannot make; for you should have shewed that Custom of the Manor was, that every Copyholder of this Tenement, or of the Manor in general, used to have Common, &c.

Powell,

Powell, who had been of Com' Banc' when Judgment was there given, agreed, That one may declare in an Action for Damages upon his Possession, without any further Title against a Wrong-doer; and he agreed the Case of Burt and Stroud upon a Legitimate possessionat', for Hindrance of Common, and good, because against a Stranger and Wrong-doer; but against the Owner of Soil, you must make Title, and so in Bar and Avowry; but where you need not shew any Title, if you go about it, and shew an ill or repugnant one, it is at your Peril: Here your Title is, that you are a customary Tenant of a customary Tenement, Parcel of a Manor; and it's true, after Verdict that will be taken to be a Copyhold; and if so, you are gone that Way; for you make Title to the Common, as belonging to the Land; whereas it should be, as to the Estate: And the whole Court was clear to affirm the Judgment; but at the Importunity of the Counsel, they gave Leave to speak to it again. Adjournatur.

How one may declare in Case upon his Possession against a Wrong-doer, &c.
4 Mod. 418.
Ld. Raym. 1091, 923, 1230.
But if the Plaintiff shew an ill Title, when he need not shew any, it is at his Peril.

Adjournatur.

Mayor of Winchester *versus* Wilks.

IT was an Action upon the Case against him for using the Trade of a Woollen-draper, within the Corporation, contra the Custom thereof; which was, That none who had not served seven Years to a Trade, or had been free of the Guild of Merchants, should use it within the Corporation.

1 Salk. 203.
S. C.
Vide ib. 193:
11 Co. 53.
1 Leon. 262.
Pal. 1, 2, &c.
Case for using the Trade of a Woollen-draper, con-

trary to Custom. Vide 2 Lev. 33. Verdict *pro Quer'*, and Motion to arrest Judgment. Ld. Raym. 1129. S. C. Cal. temp. An. 48, 49. Cal. temp. Mac. 131, 338, &c. Stra. 739.

Note; It was not grounded upon any By-Law, or for any Penalty. Verdict *pro* Plaintiff, and Motion in Arrest of Judgment, that such Action did not lie; and Cro. Eliz. 803. and the Case of the Corporation of Tornels were cited upon the Point; but the Postea being not put in, the Court ordered them to stay till it came in, and then to have it put in Paper, and solemnly debated: For Ch. J. Holt said, It was a Point not determined, whether such a Custom were good, tho' many Corporations did pretend to it: And he said, Some Corporations pretended to a Right by Custom to exclude Foreigners, but he thought they could not support it. And in Pasch. 4 Reg. Judgment was stayed upon Faults in the Declaration, and the Court declined saying any Thing upon the Merits, which they said was a Question of great Consequence.

Such Custom is a Point not yet determined.
Post 123, 124.
Judgment stayed for Faults in Narration.

Hothershell *versus* Bows.

Vide post 301.

Defendant in Custody upon mean Process having escaped, was taken upon a Warrant by Vertue of the late Act of Parliament; and Raymond moved, That upon bringing the Warrant into Court, he should be set at Liberty; but the Court said, They could not do it. And upon this Occasion Mr. Clerke said, That if a Man comes upon a Hab' Corpus, and the Plaintiff does not declare in two Terms, the Defendant shall be discharged upon filing of common Bail, without any Rules; and if one come in upon Hab' Corpus, tho' he after put in Bail; if it be not at the Return of the Process, he can't give Rules, but

One escapes upon mean Process, and is retaken by an Escape Warrant. Declaring against one that comes in by Hab' Corpus, &c.
2 Salk. 352.

Rules. must wait two Terms; and then, if there be no Declaration, shall
Costs. be discharged upon common Bail, without Costs; whereas if he
Intent of the Act against Escapers. had put in Bail at the Return of the Process, he might spur them
Vide post 63, on by Rules; or if the Plaintiff had without Rules passed two
95, 154. Terms without declaring, he should pay Costs: And the Court
New Rule made. said, The Rules were very hard upon one in Custody; and they
said, It was not the Intent of the Act to make escaping Prisoners
pay the Debt right or wrong, or to lie in Jail for ever: And
therefore ordered Mr. Clarke to draw up a Rule, That in Case a
Plaintiff did not declare in two Terms, that he should be Non
pros'd, and thereupon the Defendant discharged.

Rules upon a Narr' delivered in Hilary Term. Note; If Declaration be delivered of Hilary Term, and Rules
Vide 1 Salk. of Pleading given, if Defendant does not plead before the Effoin-
219. day of Easter Term, Plaintiff may sign Judgment for want of a
2 Salk. 514, Plea; but if the Plaintiff in that Case has not given Rules in
515, 518. Hilary Term, he must give them in Easter Term before he can sign
2 Barnes 214, Judgment. Vide post 33, 153.

219. Per Holt, Ch. J. After a second Verdict of the same Side, it
If a new Trial is not fit to grant a new Trial, because the Judge did not like
after second Verdict on the same Side. the Verdict; but if there were any Practice used in obtaining it, it
Vide 2 Salk. is otherwise.

649. Per Holt, Ch. J. If a Bond be of twenty Years standing, and
Post 242. no Demand proved thereon, or good Cause of so long Forbearance
Bond or Note of 20 Years standing. shewn, upon a Solvit ad Diem, I shall intend it paid; a fortiori up-
Ld. Raym. on a Note, if it be any considerable Sum.

1033. Cas. temp. An. 2. 1 Mod. Cas. in L. & Eq. 278, 279, 280. Gilb. Eq. Rep. 224, 225. 3 Wms. 288.
Stra. 826, 827.

Warren and Fuzz.

Cause of a new Trial for want of Evidence. Vide post 222, 224. Cas. temp. An. 111, 118, 119, 141. Cas. temp. Mac. 202, 203. 1 Mod. Cas. in L. & Eq. 220, 288, 289, 325, 326. Fitz-G. 40. Stra. 691.

PER Cur'. A new Trial ought not to be granted for want of Evidence, which the Party might have had at Trial, and had not; but if it be proved that Endeavours have been used, but prevented by some unforeseen Accident; as Sickness of the Witness, &c. it may be good Cause of new Trial. See the Case of Ford versus Tilly, 2 Salk. 653. Farell. 156, 157.

Noel and Gray.

Bail discharged upon poor Prisoners confessing the Action, &c. Vide post 301. Prisoner also discharged after a Surrender. Vide 1 Salk. 345. 2 Salk. 521. Ld. Raym. 1088. Stra. 1233.

ONE, who had been discharged upon the Act of poor Prisoners, gave Bail to an Action of Debt upon a Bond with which he was charged in Prison, and confess'd the Action, and that Execution might go against his Goods, &c. Plaintiff takes Execution against the Goods, and likewise sues the Bail, who surrender their Principal in Discharge; and this appearing upon Motion, the Court said, That Bail were actually discharged by the Pleading and Judgment, and ordered him to bring the Record of the Judgment into Court; whereupon he was taken in Execution, and that they thereupon would discharge him.

Baker

Baker *versus* Pierce.

2 Salk. 695.

S. C.

Ld. Raym.

959. S. C.

Case for

Words, You

stole my Box-

Wood, &c.

Motion in

Arrest of

Judgment, as

not being

actionable.

Vide post

104.

1 Jo. 11.

All. 11. con.

Pop. 211.

Vide Hob.

305.

CASE *versus* Pierce for these Words, You stole my Box-Wood, and I will prove it: And now Darnell moved in Arrest of Judgment, That the Words were not actionable; for he urged that these Words, You stole my Wood, and you stole my Timber, were the same: You are a Thief, and stole my Timber: You are a Thief, and stole my Corn, Hops, Apples, not actionable: For where Words charge one either with Trespass or Felony, if there be not other Words that shew the Charge to be Felony, the best Sense shall be taken: So if it be, You stole my Timber out of my Yard, Hops out of my Bag, Corn out of my Yard, &c. it will not bear Action. Hob. 331. Hutton 38. I charge you with Felony for taking Money out of J. S.'s Pocket, not actionable, because it might be without a felonious Intent. But Holt, Ch. J. condemned that Authority: Besides, he quoted Hutton 113. Thou art a Thief, and hast couzened my Cousin of his Land, not actionable; tho' it was said, the subsequent Words were accumulative, and there all the aforesaid Cases are agreed not to be actionable: Suppose the Words were, You have stolen my Coppice-wood, will they say Action would lie? For it might be Coppices cut, and carried away with one entire Act: So here; for it is not what the Party meant here, but the necessary Import of the Words that are to be considered.

Brotherick contra. You have stolen my Timber, is actionable, for it must be felled and severed from the Stock before it is Timber. Yelv. 152. Noy 114. And he remembered the old Verse of Arbor dum crescit, Lignum dum crescere nescit. 1 Rol. Abr. 70. pl. 47, 48. These Words, Thou hast stolen my Wood, and I will charge you with Felony. March 211. 2 Cro. 116. and Hob. 77. Thou art a Thief, and thou hast stolen a Tree, not actionable; for a Diversity is taken by the Court between a Tree, for that should be understood standing; but if it be felled, it is Wood. Style 9. Præcipe does lie of Boscum; but it cannot be said, One stole an Acre of Wood; and if it were not a Thing of which Felony could have been committed, we could not have a Verdict. Vide 2 Cro. Low

You have
stolen my
Timber,
actionable,
and why.
2 Cro. 66.
contra.

Cro. Jac. 166.

Ch. J. Holt, The Verdict signifies nothing in the Case, and there are contemporary Authorities that differ from my Brother Darnell's. Suppose he had said, He has stolen my Underwood?

The Verdict
here signifies
nothing.

Powell. Underwood and Coppice-wood will be taken for Wood standing.

And Ch. J. Holt said, The Opinions of later Times have been in many Instances different from those of former Days in relation to Words, for formerly there has been a Difference taken between saying,

Caf. temp.
Mac. 197,
198.
1 Mod. Caf.
in L. & Eq.
24, 30, 371.

Thou

Stra. 142, 696, 797, 666, 304, 1138, 1169, 1189, 1200.

Vide Hob.
331.
2 Cro. 114.

1 Mod. 22.
1 Lev. 280.
1 Sid. 432.
1 Vent. 50.
1 Cro. 509,
510.
1 Mod. Caf.
in L. & Eq.
290.
Hob. 117,
268.
1 Jo. 68.
Vide Hob.
77.

2 Cro. 674,
166.
40 ac. 2 Cro.
66. cont.

Thou art a Thief, and hast stolen my Wood, and, Thou art a Thief, for thou hast stolen my Wood; and Judgments have gone both Ways: But later Opinions make no Difference, if the Words be spoke at the same Time; and these are scrambling Things that have gone backwards and forwards, and the idle People in the Country that privately cut and carry away Coppice-wood, are in common Parlance called Wood-stealers. And I have heard my Lord Hale and Justice Twisden say, That they knew no set Rule for Actions for Words, but that all Words stood upon their own Feet: To say, a Man has the Por, is not actionable; but to say he has it, and got it by a Yellow-hair'd Wench in Moorfields, has been adjudged actionable; which later Words do not carry a violent Intendment that the Speaker meant the French Por, but the Sense leads more that Way than to another. And he said, that Stealing and feloniously Stealing was not the same; for in common Parlance Stealing did not always import Felony; as to cut and carry away Furze is a Stealing, but not a felonious Taking. But Powell said, he always took it, that, ex vi Termini, Stealing did import Felony, and the said Instance put by my Lord was properly Trespass, and not Stealing. And at another Day, per tot' Cur', the Plaintiff had Judgment, for all the later Authorities ran clear for him. And Holt said, it was not worth while to be learned on that Subject, but said, that for his Part, where-ever Words did tend to take away a Man's Reputation, he would encourage Actions for them, because so doing would contribute much to the Preservation of the Peace.

Wood *versus* Shepherd.

When to
move in Ar-
rest of Judg-
ment.
Vide 1 Salk.
77, 78.
2 Salk. 431.
Post 143.

Ch. J. Holt. **O**NE should not move in Arrest of Judgment till the Postea be brought in, and the Defendant should give Rule upon the Postea, which is in itself a Notice to bring it in; and it is against the antient Course of the Court to make a Rule for staying of Judgment till the Postea be brought in. By the Course of the Common Pleas, the Clerk of the Assise keeps it till the Days for moving in Arrest of Judgment be past, and the Notice is given him, and he has his Fee 6s. 8d. for attending with it, and the Clerk of Assise ought to deliver the Postea to none but to the Clerk in Court; and Notice to the Clerk in Court is good Notice.

Time to ex-
cept against
Bail after
Notice.
Vide 1 Salk.
97, 98.
Caf. temp.
An. 2, 253.
1 Barnes 82.
2 Barnes 60,
83.

Note; There are 20 Days to except against Bail after Notice, and Bail cannot be justified before a Judge in his Chamber, except it be by Consent, or for Necessity in Vacation; but in the later Case, they ought to be justified again in Term; and upon that the Defendant is compelled to accept a Declaration to go to Trial at the Assises, if it be an issuable Term. And upon putting in Bail, it is not enough to give Notice of their being put it, but it ought to be of their Names, Places of Abode, and Trade or Occupation, that Plaintiff may know how to enquire after them. And after Exception to Bail, there is
no

no set Time to justify or exchange them for better, but it must be in convenient Time.

Butler versus Rolfe.

Per Cur. **T**here ought to be a Stay of Proceedings upon the Bass-Bond upon bringing Principal, Interest, and Costs into Court after Notice of Trial, without it be brought with in such a Time as Plaintiff may not be delayed of Trial. See before, fo. 11. and post, 29, 60, 101, 153. Salk. 583, 597. Farel. 114, 140, 141.

Time of bringing in Principal, Interest, and Costs.

Queen versus Mayor of Thetford.

Upon Affidavit, that he had been served with a Mandamus on the 2d of July before, and made no Return, Stone moved for an Attachment against him, or at least to have the Alias returnable presently. Cur. It is Matter discretionary in the Court to let People run the Line out, and we may make the Alias returnable immediate, and for Contempt thereon, grant an Attachment; or if we see Occasion, we may make the first Writ returnable, and we may make them returnable de Die in Diem, or we may give short Returns; as a Mandamus returnable in a Week, and Alias in four Days after, and a Pluries with like short Return.

Vide 2 Salk. 429, 434. Ld. Raym. 848. S. C. Upon a Motion for an Attachment, &c. about returning a Mandamus.

2 Salk. 434. Post 152. Caf. temp. W. 3. 410, 164, 348. 95, 407, 857.

Per Cur. If the Person be ever so innocent, yet if there were a probable Cause of Prosecution, Action for malicious Prosecution will not lie; for it must be direct Malice, without any Colour of Cause, that will support such an Action. Vide 1 Salk. 14, 15, 21. 5 Mod. 394. 405. 1 Vent. 86. Carthew 416.

Action for malicious Prosecution. Vide postea 216, 261. Ld. Raym. 81, 377, 378, 380, 381, 503.

Ewer versus Jones.

DEE moved for a Prohibition to the Court of Admiralty to stay a Suit there for Seamen's Wages. The Contract was upon Land, and the Suggestion was, That they pleaded the Statute of Limitations, and that the Admiralty rejected their Plea; and having obtained a Rule Nisi before, it was now offered against it, that where ever the Common Law Courts allow the Admiralty Jurisdiction, they ought not to prohibit them, and here they have Jurisdiction, as in case of Hypothecation, and Sentence in Admiralty beyond Sea shall be executed by Admiralty here. Hob.---Bernard and Brigg, Suit to seize a Ship for Piracy done by the Mariners; and tho' they may sue at Common Law in this Case, yet it is hard to make them do it; for it were in Effect to give away their Right; for at Common Law the Suits must be all several, whereas they may all join in the Admiralty, and so by an easy Contribution maintain and carry on the Suit; and besides, they may sue the Ship there, which they can't do at Common Law; and the Statute of Limitation enumerates the Actions it does limit, and they are all Suits at Common Law: It is no Bar to a Suit in Equity upon a Trust, nor for a Legacy, nor

Ld. Raym. 934. S. C. Vide 2 Salk. 415, 424. 1 Salk. 31. Ante 11.

For a Prohibition to the Admiralty to a Suit concerning Seamen's Wages upon pleading Statute of Limitations.

2 Salk. 424. 1 Salk. 34, 35. Post 79, & 424, 240, 309. 1 Vent. 146. 343. Raym. 3. 2 Roll. Abr. 350. p. 10. 3 Mod. 244. Carth. 166, 518.

Ld. Raym. 152, 398, 632, 576, 577, 639, 650, 739, 838. Caf. temp. An. 43, 44. 1 Mod. Caf. in L. & Fq. 379. 1 Vern. 73, 256, 456. 2 Vern. 141, 235, 540, 541, 694, 695. Caf. temp. Mac. 263, 264.

upon a *Rationabili Parte Bonorum*; and the Reason given for the later Case is, because it is not a Common Law Proceeding, but according to a particular Custom, and a fortiori, when the Proceeding is by the Civil Law. Mar. 139, 132. Hut. 109.

Vide 1 Salk.
33.
2 Salk. 426.
Winch 8.

See now the
Stat. 4 & 5
Annæ, cap. 16.

To this it was answered, That it was an Indulgence to suffer Seamen to sue in Admiralty for Wages; for in King Ed. III.'s Time Prohibitions have gone. And it was first agreed, that for Suit upon a Contract *super altum Mare*, no Prohibition should go upon their Refusal of Plea of Statute of Limitations; but this was Matter strictly cognizable at Common Law only, in which Case this Plea had been good: And is it not hard by Indulgence to them to have Defendant barred of his just Plea: And this was what stuck with the Court, and they said, this being a Statute barring of Right, ought to be taken strictly.

Property
bound by
Sentence in
Admiralty.

Raym. 473.
2 Show. 232.

Vide 1 Vent.
32.

2 Keb. 511,
610.

1 Sid. 418.
1 Lev. 243,

267.
The Statute ill
pleaded.

Ld. Raym.
272, 893, 936.

1 Vern. 21.
Cal. temp.

W. 3. 16.
135, 143, 246.

Cal. temp.
Mac. 78, 79,

80.
Stra. 1078.

Cur. Without doubt a Sentence in the Admiralty, where they have Jurisdiction, binds the Property; and the Chief Justice remembered the Case of Hughes and Cornelius: France and Holland were at War, and the French took a French Ship as a Dutch one, and the Ship being sentenced as Prize, was sold by Virtue of the Capture; and the first Owner brought an Action of Trover, and the Sentence was given in Evidence, and upon Special Verdict held, the Property was altered by the Sentence. But to the Point in Question, if the Statute had been well pleaded, they all seemed to incline a Prohibition ought to go upon Refusal of it. But as it was here pleaded, it was ill, viz. That it did appear by the Libel, that the Suit was six Years after the Cause of Action, which was ill; for the Time on which it is laid is not material, and therefore the Defendant ought not by his Plea to hold the Plaintiff to the immaterial Time, but to plead directly that no Suit had been within six Years after Cause of Action accrued; and if notwithstanding a Matter ill pleaded by you, they go on, why should we prohibit them? No; shall we rather think that they rejected your Plea as not at all allowable by their Law as to its Matter, than because it was bad in Substance, as to the legal Manner of Pleading it. They also agreed, That if they refuse a Plea, which by their Law is a good Plea, it will be Reason to appeal, but not to prohibit them: And the Rule was discharged.

From what
Time Duty to
Seamen arises.
3 Lev. 60.

Note; In case of Seamen, the Duty does not arise from the Contract, but from the Service done; and therefore, tho' the Contract were above six Years, and any Part of the Service within that Time, it is out of the Statute: And if a Man be beyond Sea at the Time the Debt accrues, he may plead it by Way of Replication to the Defendant's Bar of the Statute. Vide Stat. 4 & 5 Annæ, cap. 16. § 18, 19, 20.

Debt lies for
Money devised
out of Lands.
Vide 2 Salk.
415.
Ld. Raym.
937.

Per Holt, Ch. J. If Money be devised out of Lands, sure the Devisee may have Debt against the Owner of the Land for the Money upon the Statute of 32 H. 8. of Wills; for where-ever a Statute enacts any Thing, or prohibits any Thing, for the Advantage of any Person,

son, that Person shall have Remedy to recover the Advantage given him, or to have Satisfaction for the Injury done him contrary to Law, by the same Statute; for it would be a fine Thing to make a Law by which one has a Right, but no Remedy but in Equity; and the Action must be against the Covenantant.

Kingsdale *versus* Mann.1 Salk. 321.
S. C.

Possession was delivered by Hab. fac. possess. about nine a-clock in the Morning, and towards six a-clock at Night the Plaintiff was forcibly turned out of Possession; and this Matter being set forth by Affidavits, the Court held, That upon an Habere fac' Possess. it is not a compleat Execution, till the Sheriff or his Bailiffs deliver the Possession to the Party, and are gone away; That if immediately after such Execution the Defendant turns him out of Possession, it would be a Disturbance of the Execution, for which an Attachment ought to go: But here they doubted, whether after so many Hours Distance, it could be looked upon as a Disturbance of Execution; and therefore the Rule was, to shew Cause why an Attachment should not go: And Powell quoted a Case in the Common Pleas, where, upon an Entry upon the Plaintiff the same Day he had Execution, the Court granted a new Habere fac. Possess. To which Ch. J. Holt answered, So they might, if the first Executions were not returned, otherwise not. Quod Curia concessit.

When Execution is compleat upon an Habere fac' possess. Vide postea 115. Ld. Raym. 252, 346, 482, 718, 725, 1072. 3 Wms. 399, 400.

Vide postea 115, 298.

Longvill and Hundred of Thistleworth.

2 Salk. 498.
S. C.

The Defendants appeared, and took a Declaration in Trinity Term; and the Attornies of both Sides discoursing about the Original, the Plaintiff's Attorney told the Defendant's Attorney the Original was filed; but he had a Copy of it, whereof he gave the Defendant's Attorney a Copy, who pleads in Abatement; and after a Respond' Ouster awarded by the Court, he gives the Plaintiff's Attorney a Plea, setting forth an Oyer of the Original therein. And the Question was, Whether the Plaintiff should be obliged to receive this Plea, all this having been transacted in one Term?

Ld. Raym. 969. S. C. Plea in Abatement, and Respond' Ouster.

Quære, If the Plaintiff ought to receive this Plea.

Ward for the Plaintiff. After Plea, the Party can never be intitled to pray Oyer of the Writ. In Dower you cannot do it after View. Indeed if they had demanded Oyer, tho' they had no Right to it, and we had granted it to them, they might perhaps take Advantage of it.

Oyer of Writs. Vide Farell. 9. 3 Lev. 50. 5 Co. 74, 76. Post 122. Ld. Raym. 84, 347.

Mountague contra. One may have two Sorts of Pleas to abate the Writ: 1. To the Action of it: 2. That tho' it be well as to the Action of it, yet it may be faulty in its Frame, for Want of legal Form, or Agreeableness with the Register; and therefore tho' we first plead to Action of the Writ, and that be judged against us, why

Two Sorts of Pleas to abate the Writ. Ld. Raym. 926, 1014, 1022, 1056, 1243, 1178, 1208, 1249, 1409.

Demurrer af-
ter Oyer, yet
but one Dila-
tory.

No Oyer after
Impar lance,
&c.
Lane 39.
2 Lev. 142.
Oyer and Plea
in Abatement
after general
Impar lance.

If after Abate-
ment to a
Bond.
2 Lev. 144.
Ld. Raym.
84, 347, 970,
1056, 1176.
1 Barnes 163,
234.

Per Cur', no
Oyer after Plea
in Abatement,
and why.
Vide 1 Salk. 7.
and post 225.
That a Plea
to a Bond for
Mishomer
must be before
Oyer, for by
Oyer you ad-
mit the Name.
Vide Hob.
162.

Vide postea.
Of ancient and
modern De-
mands of Oyer,
and Grant
thereof.

Oyer of a Deed.

why can't we have Oyer of the Writ, in order to plead to it for a fault in it self, or demur to it? And after a Plea in Abatement, Defendant may demur generally: Quod Cur' concessit; for the Demurrer then is in chief; and he did agree the Rule to be, That one should plead but one Dilatory; but he insisted upon it much, that being in the same Term, they might crave Oyer of the Writ specially in order to plead in Bar, or demur: And now Holt, Ch. Just. hæsitabat, for these Reasons: 1. He agreed, That after Impar lance one could not demand Oyer; for Impar lance is always unto another Term. 2. He agreed, That after Plea in Abatement one could not have Oyer even in the same Term, to plead another Dilatory. But what stuck with him was, whether this being in the same Term, they might not crave Oyer in order to demur to the Count, and shew Variance between it and the Writ, or have it on Record before the Court in order to move it in Arrest of Judgment, or to take Advantage of it upon Writ of Error, without being put to the Charge of a Certiorari? And he said, That after Plea in Abatement to a Bond, you may have Oyer; and if you insist upon it, you must enter your Prayer of it on Record, and they shall counterplead or demur to your Prayer; that if we give Judgment against you, you may have your Writ of Error; for tho' granting Oyer where it ought not to be, is no Error, yet denying it, it is: And Darnell quoted the Case of London and Bury, where the Plaintiff was forced to counterplead the Oyer: But at another Day, per tot' Cur', There shall be no Oyer after Plea in Abatement; for the true Reason of Oyer is, that the Defendant may demur, and shew some Cause, as a Variance between it and the Register, &c. and that amounts to a Plea in Abatement, or to plead some Matter in Abatement: Vid. Co. Ent. 320. That after Plea in Abatement over-ruled, Defendant has no more to do with the Original; and as to what occurred to the Chief Justice, that it might furnish with Matter in Arrest of Judgment, the Court all agreed now, such Motions were not Ads on Record, but are in Nature of Informations to the Court, as from amicus Cur', to prevent erroneous Judgments.

Powell, Justice, in this Case said, That formerly all Demands of Oyer were in Court, as it is now in Case of Appeal; but that now it is demanded and granted between the Attornies, and where there ought to be Oyer, one is not bound to plead without it: And if one Attorney in Time demands Oyer of the other, and he tells him the Writ is filed, and that he may take it, it is well; but sure he cannot without such Consent enter a Demand, and a giving of Oyer; for if Attornies be admitted so to do, they will set forth the Matter falsely; which tho' it could not ensnare the other Side, because they may produce the right Writ, &c. and have it entered, yet it would be very tedious and inconvenient; as if a Deed be pleaded, it remains in Court all that Term, yet one cannot go to the Officer, and take Oyer of it without Leave of Court, or of the Attorney; and the very form of Pleading shews it must be upon Demand, and Oyer of a Writ is in order to object to it; and after you have pleaded your Dilatory without

without Oyer, to what Purpose should you have it now : It cannot be to plead it in Bar ; and to plead a Dilatory it cannot be, because that would be to let you plead a Dilatory after Dilatory ; and to assign a Variance between the Writ and Count would be a Dilatory. So per tot' Cur', they were denied the Oyer.

Oyer denied
per tot' Cur'.

Per Cur'. It has been settled here on Debate, that Money ought not to be brought into Court to have it struck out of the Declaration, where an Executor is Plaintiff ; but you may plead a Tender, and touts temps prist.

Where Money
ought not to
be brought into
Court, &c.

Vide ante 11,
25, &c.

2 Salk. 583,
596, 597.

1 Salk. 130.
S. C.

Action by an
Indorsee upon
a Note to pay
to J. S. or Or-
der, &c.

Motion in Ar-
rest of Judg-
ment.

Distinction
taken.

Buller *versus* Crips.

A Note was in this Form : I promise to pay J. S. or Order, the Sum of 100l. on Account of Wine had from him. J. S. indorses this Note to another ; the Indorsee brings an Action against him that drew this Note, and declares upon the Custom of Merchants, as upon a Bill of Exchange ; and a Motion was in Arrest of Judgment upon the Authority of Martin and Clerk's Case.

But Brotherick would distinguish this Case from that ; for there the Party to whom the Note was originally made, brought the Action, but here it is by Indorsee ; and he that gave this Note, did by the Tenor thereof make it assignable or negotiable by the Words [or Order] which amounts to a Promise, or Undertaking, to pay it to any whom he should appoint, and the Indorsement is an Appointment to the Plaintiff.

Ch. J. Holt. I remember when Actions upon Inland Bills of Exchange did first begin ; and there they laid a particular Custom between London and Bristol, and it was an Action against the Acceptor, the Defendant's Counsel would put them to prove the Custom ; at which Hale, who tried it, laughed and said, They had a hopeful Case on't : And in my Lord North's Time it was said, That the Custom in that Case was Part of the Common Law of England, and the Actions since became frequent as the Trade of the Nation did increase ; and all the Difference between Foreign and Inland Bills is, that Foreign Bills must be protested before a Publick Notary, before the Drawer may be charged ; but Inland Bills need no Protest : And the Notes in question are only an Invention of the Goldsmiths in Lombard-street, who had a mind to make a Law to bind all those that did deal with them ; and sure to allow such Note to carry any Lien with it, were to turn a Piece of Paper, which is in Law but Evidence of a Parol Contract, into a Specialty, and besides, it would impower one to assign that to another, which he could not have himself ; for since he to whom this Note was made could not have this Action, how can his Assignee have it : And these Notes are not in the Nature of a Bill of Exchange ; for the Reason of the Custom of Bills of Exchange is for the Expedition of Trade, and its Safety ; and likewise it hinders Exportation of Money out of the Realm : He said, If Indorsee

When Actions
upon Inland
Bill of Ex-
change first
began.

Vide 5 Mod.
13.

Difference be-
tween Foreign
and Inland
Bills.

Vide post 81.
Ld. Raym.

181, 281, 744,
757, 759, 774,

1361, 1362,
1396, 1481,

1545, 1563,
1377, 1484,

1542, 1545.
Cas. temp.

W. 3. 36, 37,
107, 192, 193.

211, 212, 213,
241, 244, 345,

346, 380, 408,
410, 517, 521,

564.

Cas. temp. Mac. 286, 287, 294, 316. 1 Mod. Cas. in L. & Eq. 307, 362, 43, 265, 266, 267, 373. Comyns 75, 311, 563, 579. Stra. 591, 762, 1211, 441, 515, 649, 1087, 22, 24, 629, 706, 1151, 1217, 1271, 264, 399, 609, 674. * These Notes are not in Nature of Bills of Exchange. Vide 1 Salk. 442. 1 Salk. 24, 129. What Actions lie on Bills of Exchange, and how brought, and against whom, vide Hard. 487. 1 Mod. 285. 1 Lev. 298. 2 Keb. 334, 695. 2 Vent. 307. 1 Keb. 592, 636. 1 Vent 45, 152. 1 Salk. 24, 124 to 133. Faresl. 45, 152.

Vide 1 Salk.
124 to 133.

It seems In-
dorsee might
bring an Action
in the Indor-
sor's Name.

*Bromwich &
Lade's Case.*

Vide Noy's
MS. 278.

Vide 3 Lev.
299.

3 Mod. 86.

*Dubitatur in
Com' B.*

Merchant in-
forms the Ch.

J. concerning
these Notes,
&c.

That a Bill of
Exchange may
be made be-
tween two Per-
sons, and how.

*Cur. advisare
vult.*

S.C. Post. 114,
178, 169.

Indictment
against a Ju-
stice of Peace
& al^o, for ar-
resting M. up-
on a pretended
Warrant
knowing it to
be forged, &c.
Farell. 99.
Vide post 90.

Defendant ac-
quitted as to
knowing the
Warrant was
forged, but
found guilty of
the rest.

had brought this Action against Indorsee, it might peradventure lie; for the Indorsement may be said to be tantamount to a drawing a new Bill for so much as the Note is for, upon the Person that gave the Note; or he may sue the first Drawer in the Name of the Indorsee, and convert the Money when recovered to his own Use; for the Indorsement amounts at least to an Agreement, that Indorsee should sue for Money in the Name of Indorsee, and receive it to his own Use; and besides, it is a good Authority to the original Drawer to pay the Money to Indorsee. And Powell, Justice, cited one Case, where a Plaintiff had Judgment upon a Declaration of this Kind in the Common Pleas; and that my Lord Treby was very earnest for it, as a mighty Conveniency for Trade; but that when they had considered well the Reasons why it was doubted here, they began to doubt too: And the whole Court seemed clear for staying Judgment. And at another Day the Chief Justice declared, That he had desired to speak with two of the most famous Merchants in London, to be informed of the mighty ill Consequences that was pretended would ensue by obstructing this Course; and that they had told him, It was very frequent with them to make such Notes, and that they looked upon them as Bills of Exchange, and that they had been used for a Matter of 30 Years; and that not only Notes, but Bonds for Money, were transferred frequently, and endorsed as Bills of Exchange. Indeed, I agree a Bill of Exchange may be made between two Persons without a third; and if there be such a Necessity of dealing that way, why do not Dealers use that way which is legal? and may be this: As, if A. has Money to lodge in B.'s Hands, and would have a negotiable Note for it, it is only saying thus; Mr. B. pay me, or Order, so much Money Value to your self; and signing this, and B. accepting it: Or he may take the common Note, and say thus; For Value to your self, pay me (or Indorsee) so much; and good: And the Court at last took the Vacation to consider of it.

Domina Regina *versus* Tracy.

TRacy, a Justice of Peace of Middlesex, was indicted; for that he, together with T. and F. by Pretence of a certain Warrant in Writing, supposed to be signed and sealed by Sir S. L. Recorder of London, did arrest J. M. and brought him before J. C. a Justice of Peace of Middlesex, licet the Warrant was not directed to any of them, and licet it were forged and counterfeit to Tracy's Knowledge; and that Tracy, when M. was before the Justice of Peace, perswaded him to refuse to bail him, tho' the Fault being a Misdemeanour, were in its Natureailable; and that when J. M. was committed by the Justice, Tracy and the other two, at the Perswasions and Instance of Tracy, did extort divers Sums of Money from him.

The Jury acquit the Defendant of the Forgery, or knowing that the Warrant was forged, and find him guilty of all the rest. And now it was moved in Arrest of Judgment by Weld and Parker.

1. That the Verdict was contradictory, for it acquitted him of that which was the Foundation of all that whereof he is found guilty; for the Charge is, That he did so and so by Virtue of a certain forged Warrant; and if the Warrant be not forged, the rest either is no Crime, or rather it is another Offence than what the Defendant is charged with; for to get one taken up upon a real Warrant not directed to him, and to do whatever is charged here thereupon, is another Offence than is described here: Therefore Defendant is acquitted of the Offence wherewith he is charged, and found guilty of another.

Moved in Arrest of Judgment, that the Verdict was contradictory and why.

2. Objection was, That it was laid, that he prevailed with the Justice of Peace to refuse Bail, and it was not laid that any Bail was offered.

Object. As to prevailing with the Justice to refuse Bail, &c.

3. It is not directly said, That the Justice did commit him; but only, that when he did commit him, Tracy did so and so to him; and it may be he never was committed for ought appears here.

4. They ought to shew the Certainty of the Sums taken, and for what they were taken, otherwise the Defendant may not know what Answer to make.

Obj. As to the Execution of Money, &c.

5. As to some Part of the Charge, they charge him as Accessary; when it being Trespass, they all are Principals, and ought to be charged as such.

And upon the first Objection, a Case of Indictment against the Players of Drury-Lane was cited; where the Indictment was for building a Scandalous House for Acting of profane and lewd Plays, and that they acted such Plays; yet tho' they could prove the Acting of immoral Plays; yet because they could not prove the Building, the Defendants were acquitted.

To the 1st it was answered, That tho' the Indictment did not alledge the Warrant to have been forged, but only under a [licet] by way of Aggravation, and not by way of Description; and though Warrant be not forged, yet the Facts charged upon the Defendants are criminal, as to perswade one by wicked and false Insinuations to refuse Bail, to have cruelly used him in Gaol, and by Duress to extort Money of him.

Resp. 1. That Forgery was only as Aggravation, &c.
1 Vent. 12, 234, 362.
Raym. 118, 176.
Hob. 205, 266.
2 Keb. 473, 476.

As to the 2d Objection, That it was not said, Bail was offered; it was said, every Refusal must be of an Offer, and Refusal could not possibly be without an Offer.

3. That it was not said, That he did commit him: It was answered, That the Commitment there was not charged as a Crime, but only to serve as an Inducement to the Extortion, which is directly charged; and what comes under an Inducement, need not that Preciseness.

Holt, Ch. J. As to 1st, the Question is, Whether the Forgery be the Ground-work, or whether it be an unnecessary Addition put in only for Aggravation: For if it be Matter of Description, the Objection is of Weight.

Resp. Ch. J. That the two first Objections were of Weight.

As to 2d Objection, That no Bail were offered; it is true, a Justice of Peace is not bound to ask for Bail if they be not offered him, and therefore the Objection seems of Weight, and something has been offered, that a Verdict would influence the Case; but it does not, for in criminal Matters the Jury is only charged to inquire of Matters as they are alledged.

1 Vent. 19.

Vide postea.

4 Co. 41, 48.

9 Co. 66.

Noy 41, 32.

Plow. 85, 86.

1 Ro. Ab. 79,

80.

Principal and

Accessory.

Ld. Raym.

844, 845,

846, 1370.

Caf. temp. An.

25.

3 Wms. 475,

439, 485, 493.

3. That he could not procure if it were not actually done: That is true, but that is but Argumentative; and Indictments ought to be positive and direct.

4. As to the Execution, the Crime does not consist in the Quantum of the Money extorted, but in taking any at all.

5. You object, That he is not in some Things charged as Principal. It is to be known, that a Fact which would make one Accessary in Felony, in Treason and Trespas makes him a Principal; and sure one may lay the Matter either Way, viz. making him Principal or laying it special, as it will appear upon Evidence. In Treason, all are Principals, and if upon the Statute of 25 Ed. 3. one conspires the Death of the Queen, and is committed to Prison for the same, one procures him to escape, or harbours him after such Time as he knows him charged with Treason, or to have committed Treason, you may indict him upon the special Matter: That A. committed Treason, that B. knew of it, and received him; and yet this is not one of the Treasons mentioned by that Statute, but it is so by necessary Consequence of Law. As if a Thing be made Felony, all Accessaries before and after are Felons in Consequence; and if an Offence which is Felony be made Treason, they that would have been Accessaries before, shall now be Principals.

That the Facts may be laid specially in Declarations, and is the best Way.

See Carthew

113, 216, 4,

382, 403, 404.

Whether the Crime charged need to be directly alledged to be done.

Powel. Sure the Fact might be laid specially in Trespas; for Indictments need not be like other Pleadings, according to the Construction of Law upon the Matter; and so it may be in case of Treason, and it was the Case of Abingdon and Gardner in Gunpowder Plot: And in ancient Indictments of Murder upon Malice in Law, the Malice in Law used to be specially laid; but since, it has been agreed, that it may be generally, Ex Malitia: and, I think, in the principal Case, it is more prudent and safe to draw the Indictment upon the special Matter; for otherwise it might be difficult to persuade the Lays Gens, that Procuring, Inciting, Commanding, &c. would make one a Principal. And as to the two first Exceptions, he agreed with the Chief Justice; but he doubted whether, if an Indictment charges one to have procured a Crime to be done, it need be directly alledged that it was done: As if the Indictment were for maliciously procuring one to be indicted of Felony, whether it need be directly averred that he was indicted, because the Word procuravit necessarily seems to import it; and not only that he procured ad faciend', as you would have it, that is, to consent and agree to do it. And as to the Incertainty of the Sums extorted, an Indictment for Egrossing magn. Quantit. Frumenti was held good; and where you insist, that the Warrant being true and real, the Arrest was lawful, and that falso & malitiose are only Pepper and Vinegar, which will not determine any Act to an ill Sense; sure

sure it is hard to maintain that falso & malitiose are only Pepper and Vinegar, for those Words discover the evil Root from which the Fact sprung. And Ch. J. Holt said, That Ex Malitia præcogitata, in an Indictment for killing a Man; was such Sauce as would cut his Throat; and tho' it be admitted that the Warrant being true, the Arrest was lawful, yet that arresting a Man upon a true Warrant, and procuring the Refusal of Bail when tender'd, as the Fact appear'd, and following the Party into Gaol, and extorting Money from him there by Durels and Threats of Iron; was such a complicated Offence as deserved an Indictment; and that the subsequent Tort made the original Act illegal, as being an Abuse of legal Process. And at another Day Ch. J. Holt declared, That they were all of Opinion, that they could not give Judgment upon the Indictment; that it was too incertain, and one complicated Offence; that it did not appear by it that any Bail had been offer'd, or what Sum, or that any certain Sum was extorted: But they only gave Judgment to quash the Indictment, and not for the Defendant, whom they ordered to enter into a new Recognizance to appear to a new Indictment.

Vide 1 Vent. 12, 18, 23, 25.

What tho' the Warrant was true, and the Arrest lawful.

Per Cur', They could not give Judgment for Incertainty, ante 32. Indictment quash'd, and Defendant to appear to a new one.

Wiat qui tam *versus* Ayland.

IT was a Declaration of Michaelmas Term generally, which Prima Facie is to be intended to be of the first Day of the Term, and the Fact was laid to be on the 15th of November after, so the Action brought of their own shewing before Cause. Per Cur'. If upon Examination it does appear, that the Declaration was after the 15th, it shall be set right, as if the Bail was filed after the 15th, or the Bill of Middlesex taken out, and so it was refer'd to the Master to examine. They all agreed, it could not be amended by any Statute of Jeofail; but if Bail were filed, after the 15th of November, that would be a good Warrant for a Memorandum of the Day that Declaration was of, for none is in Custod' Mar' till Bail filed.

1 Salk. 324. S. C.

Ld. Raym. 977. S. C. Vide 2 Salk. 682.

2 Saund. 169. Upon Narr' Fact seem'd to be laid before Cause. But if Declar' was after, that it should be set right, &c.

1 Vent. 135. Vide 2 Lev. 13.

Hob. 73. 2 Lev. 176. 1 Barnes 10, 17. 2 Barnes 12, 153, 154, 287. Ld. Raym. 897. Caf. temp. W. 3. 274, 275, 442, 5, 93. Caf. temp. An. 92, 45, 198. Caf. temp. Mac. 340. 1 Mod. Caf. in L. & Eq. 306. Fitz G. 193, 194. 2 Barnes 271. Stra. 1271, 806, 1023.

Note, At last Parties agreed to waive Execution, and goto Trial again.

Touching Declarations, &c. See Carth. 113, 117, 216, 382, 407, &c. Post 129.

The Queen *versus* Bothell.

IF one bring a Certiorari to remove an Indictment, and does not give Bail to try it according to the Statute, it is no Superfedeas; and a Record once filed in this Court, is never sent back: Though Brotherick at the Bar said, it might be sent back the same Term. Vide postea 40, 43, 83, 61.

Vide 1 Salk. 149. ante 17.

Bail upon a Certiorari to remove an Indictment, &c.

Ld. Raym. 722.

Caf. temp. W. 3. 646.

Squire *versus* Grevell.

Error of a Judgment in C. B. in Debt upon a Bond for Performance of an Award; after Null Award pleaded, the Plaintiff did set forth an Award on such a Day, reciting several Suits depending between the Parties in the Common Pleas, and a Sub-

1 Salk. 74. S. C.

Ld. Raym. 961. S. C. Error in Debt upon Award.

Ld. Raym. 116, 247, 248, 612.

K

mission

898, 989, 1142. Caf. temp. W. 3. 116, 117, 130, 139, 423, 534, 587, 635. Caf. temp. Mac. 200, 221, 204, 205. 1 Barnes 43.

mission of all Matters pending. 1. The Arbitrators award, that all Suits between the Parties shall cease. 2. That the Defendant should pay the Plaintiff 10l. in full of all Demands, and also give him a Release from the Beginning of the World to the Time of the Award made. 3. That upon Receipt of the 10l. the Plaintiff should make a Release to the Defendant from the Beginning of the World to the Time of the Award.

1. Exception upon the Awarding Suits to cease.

Parker took three Exceptions to this Award: 1. It is not final, for it is only that all Suits now depending should cease, that is to say, should not go on; which is no more than that the Party should be nonsuited, which is not final, and therefore not good: It is true, no new Suit can be brought while these pend, because these may be pleaded in Abatement; nor can these be prosecuted because of the Award; but if either of the Parties die, new Suits may be prosecuted for the said Causes, notwithstanding this Award.

2. Upon the Award, a general Release.

2. The Awarding a general Release would indeed make it a good Award, if it were conclusive, but it is left in the Plaintiff's Election whether he makes any or not; for the Release is ordered to be made upon Receipt of the 10l. and it is not awarded that he shall receive it, and if he refuse, he is not bound to release.

3. Release to be to the time of the Award.

3. The Release is ordered to be till the Time of the Award; but he confess'd he did not much insist upon that; the Authorities were against him upon a double Reason: 1. That no Cause of Action shall be intended to have arisen between the Time of the Submission and Award, if it be not shewn. 2. That a Release to the time of the Submission is a good Release in Pursuance of the Award, and the latter he said he took to be the better Reason; for a Man might have a Cause of Action accrue to him between the Submission and the Award, and not know of it, and it were hard to put him under a Necessity of releasing it; and the Reason why a Release to Time of Submission is held good, is not because it shall be intended to be the Meaning of the Arbitrators that it should be so, but it is rather a controlling of their Meaning as far as it is void by Construction of Law.

Vide 3 Keb. 253, 666.

Resp. 1.

Pengelly contra. The Awarding that all Suits shall cease, is that they shall for ever cease, and it extinguishes the Duty; for if the Words had been that all Actions should cease, the Duty had been gone, for if the Remedy be gone, the Right is gone; and the Word Suit is of a larger Extent and Sense than Action; for by Release of Suits one may bar himself of Execution, which he cannot do by Release of Action. 1 Rol. Ab. 261. p. 7. That such Award extinguishes the Duty. Pasch. 29 Car. 2. Strangford & Greene, and 11 W. 3. Ball & Hescott, in this Court, Award was, That one of the Parties should pay the other so much Money on such a Day, and that all Suits should cease till Failure of Payment, and good, 1 Lev. 58. Besides, this Sum being awarded in full of all Demands, and the Submission being with an Ita quod de prem', it is in itself final. Aleyn 26. 1 Rol. Ab. 260. pl. 55. 1 Sid. 154. 1 Lev. 132, 133. Hob. 190. Aleyn 85. Style 27. 1 Rol. Ab. 258, 259. 3 Cro. 851. 3 Cro. 448.

Holt,

Holt, Ch. J. As to the Release you say, That it is put upon the Party's own Act, in receiving or refusing the Money, to release or not; but it has been held in London and Craven's Case, in the latter End of Style, That where a Thing is agreed to be done upon Payment and Receipt, that Tender of the Payment and Refusal intitles the Party to it as much as an actual Payment, and the Authorities have been so ever since. Quære 9 Co. 79. Dyer 356. 1 Lut. 224, 227, 238. Lev. Ent. 30. 2 Saund. 96.

Then as to the next Point, That all Suits pending between the Parties should cease; The Question is, Whether this goes to the Cause of Action? A Man releases his Action, and has no other Remedy for his Right but an Action; Does not that discharge the Right of the Thing? Now here is an Action depending, if a Man release that Action, he thereby releases the Right of Action, and by the same Reason determining Suit determines the Right of the Thing, because there is no Remedy but by Suit; then this Award is final. If in Trespass the Plaintiff after the last Continuance releases the Action, the Right is gone; and if a Release would do it, why not an Award? Indeed if the Party had two Remedies, one by Action, and another by Entry, if he released the Action, he might notwithstanding enter.

And as for the Release to the Time of Award made, it shall not be understood that there was any Cause of Action meant, if it be not shewn; and if there be, the Party may shew it, and say that he tendered a Release to the Time of the Submission.

Powell. I think all the three Points are final, or if but one of them is so, the Award will be good for so much, if that does not depend upon another Branch of the Award which is ill; and if there were any Suits pending, the Awarding they should cease is, that they should be at an End for ever; and the Words [now depending] was only to shew what Sort of Actions they made their Award of. And the ten Pounds being awarded to be paid in full of all Demands, that shall be intended in full of all Demands to the Time of Submission, and not to Time of Payment. And if Money be awarded to be paid, and that the other upon Receipt shall make Release, that I take to be an Award to receive, and for this he quoted a Case in the Common Pleas in his Time, and 1 Rol. Ab. 254, 255. pl. 16.

And per Holt, Ch. J. Here the very Awarding a Sum of Money is a Bar of Actions; for by the Awarding Money to him, there is thereby a Duty arises, and vests in him, which is a good Bar, where ever Accord with Satisfaction is a good Plea; but anciently it has been held, That if the Thing awarded be not Money, but the doing of some collateral Act, the Party to whom it is awarded is without Remedy, and therefore such Award would be void. But the contrary has been held since, for if two Men submit to the Award of a third Person, they two do also thereby promise expressly to abide by his Determination, for agreeing to refer is a Promise in itself; but where a Sum of Money is order'd to be paid, it is immediately a Duty, and if there were no more than an Award to pay a Sum of Money

Resp. 2.
Tender and
Refusal, as
much as
actual Pay-
ment.
Style 481,
388.

Determining
the Suit de-
termines the
Right.
Co. Lit. 289.
2 Roll. Abr.
404.
1 Danv. 1.
Cro. El. 14,
161.

Release to
the Time of
Award.

If one Point
is final, the
Award good
for so much
if, &c.

To pay 10*l*.
in full of all
Demands,
how far ex-
tends.
2 Cro. 354.
1 Salk. 74, 71.
Style 44.
Hob. 49.
8 Co. 97.

Is final, and
a Bar of
Actions.
1 Vern. 157,
158.

Judgment
affirm'd.

Money in Satisfaction of all Demands, it would be final. And
Judgment affirm'd per tot' Cur.

2 Salk. 442.
S. C.

Ld. Raym.

928. S. C.

A Case made

at Guild-hall

concerning

Payment of

60l. to a

Merchant's

Servant, by a

Bill of Ex-

change, &c.

on another

who had just

failed before.

Vide 5 Mod.

398, 399.

Moll. Li. 2.

c. 10. §. 17.

Ward *versus* Evans.

A Case made before my Lord Ch. J. Holt at Guild-hall was this:
One F. owed the Plaintiff 60l. by Bill of Exchange. Evans
the Defendant owes F. 100l. also by Bill. The Plaintiff sends his
Man to F. with the Bill for Payment. F. sends his Man with the
Plaintiff's Man to Evans with the Note of 100l. to pay the Plain-
tiff his Bill. E. writes off 60l. of the 100l. Note, and endorses
it upon the Back, and gives the Plaintiff's Servant a Bill of 60l. 10s.
upon another Person for his 60l. taking 10s. from the Plaintiff's
Servant, who the very next Day carries the Bill for Payment to
the Party, who had just failed immediately before: And if this were
a good Payment by Evans to the Plaintiff was the Question.

Darnell Serjeant. There are three Things to be consider'd
here: 1. How far the Transaction of a Servant as to Receipts
and Payments shall bind his Master? 2. What amounts to a
Payment? Whether such a Note as was given here were good
Payment to the Master himself. 3. Whether, tho' this Trans-
action of the Servant would not bind the Master generally, it
will be so between Goldsmiths, as this Case is?

If a Mer-
chant's Ser-
vant may ac-
cept of a
Bill of Ex-
change with-
out Autho-
rity to do it.
Vide Winch
24, 25.
3 Mod. 86.
3 Lev. 299.
Moll. L. 2.
c. 10. §. 19,
27, 29.

As to the 1st, he said, That upon this Head of Servant binding
Master by his Act, there might be a reasonable Difference between the
Servants of Merchants and those of other Men; for probably Ser-
vants may affect their Masters being Merchants, &c. in Point of
Charge and Discharge; but that first must be in Matters purely
concerning their Trade and Way of Dealing, as to answer Bills of
Exchange, and Letters of Advice concerning Goods, or such like,
which require Dispatch; but he cannot accept of a Bill of Exchange,
without plain Evidence that he has Authority to do it. So is Lex
Mercat. 265. which is an excellent Book concerning these Matters.
And it is good Evidence in that Case, that the Master allowed the
Payment or protesting of Bills drawn by him, or gave him such Au-
thority; for it is hard to put it in the Power of a Servant to ruin
his Master without his Order or Knowledge. And it was never
heard, that if Merchant sends his Servant to receive Money, that
he may receive a Bill for it; and without Doubt it would be void
if done by any other Servant of private Person, because beyond
his Authority, which ought to be pursued strictly.

Whether such
a Bill be Pay-
ment at all.
Ld. Raym.
442.
Caf. temp.
W. 3. 241,
244, 408,
517, 521,
346, 380, 564.

2. Whether such a Bill be Payment at all? The Law takes no
Notice of any Payment to discharge a Debt but ready Money, or
something else given and taken in Satisfaction. A less Sum is
not Payment for a greater, if not before it is due, or at another
Place than it is payable at. Mar. fo. 25.

2

3. It

Caf. temp. Mac. 109, 110. Stra. 1248, 480, 505, 653, 955.

3. It being the Case of Goldsmiths does not alter the Case, for the Delivery of these Notes as is now used is no Part of their Trade; a very new Invention, already obnoxious to such Practices as deserve no Encouragement.

If between Goldsmiths doth alter the Case.
Vide 2 Salk. 442.

He agreed, That in some Cases such Notes may be given for absolute Payment, as if one comes to buy Goods of another, and having agreed on a Price, the Buyer, upon Delivery of Goods, gives the Seller a Goldsmith's Note in Satisfaction: This shall be looked upon as Payment prima facie, because being all at one Time, it shall lie upon the Seller to prove that it was a conditional Payment, and so expressed at that Time; but here it lies upon the Giver to prove that he gave it in Satisfaction. Secondly, The Party's not going immediately to call for it, is Evidence that it was taken in Satisfaction; but he went the next Morning.

How such Notes may be Payment, and on whom the Proof lies.

Holt, Ch. J. It is plain the Servant was sent by his Master to receive the Money, and not the Bill. Next, it is also plain, if the Servant upon Tender of the Bill had come back to the Master to know his Mind, and the Master had sent him back for the Money, and notwithstanding he had took the Bill, that would not have charged the Master, but here was some time for the Master to assent to what Servant had done: But giving such a Bill as this upon an original Contract, is Evidence that it was given and received for Payment; and he held clearly, that the Indorsement by Evans on the Note of F. was a Receipt by him of so much Money to the Use of Plaintiff, for which an Indebit. assumpsit would lie; and in this Point they all clearly agreed without Doubt.

Vide Pasch. 5 Annæ, in B. R. Sir Cha. Thorold. *versus* Smith. Hob. 154. Moll. L. 2. c. 10. §. 17.

1 Salk. 132, 133.

And at last they all agreed, That if Master send his Servant to receive Money upon a Goldsmith's Bill, or any other, and he takes another Bill upon another Person for Payment, that shall not bind Master without some subsequent Act of Consent, as if he would not send the Bill back in reasonable Time, with regard to Circumstances, &c. And Ch. J. Holt desired the Counsel, if they were not satisfied with the Opinion of the Court, to have their Bill of Exception, and that he would sign and seal it, that they might have a Writ of Error, which they declined.

Where Master not bound by such a Bill taken.

Per Holt, Ch. J. If there be two Coroners, one whereof being a Beggar suffers an Escape, it is very hard to charge the other with it. The Case came before me once, and I would not take upon my self to determine it, tho' my Brother Levinz reports that I would have over-ruled him in the Exception. And that Case has been argued several Times in the Common Pleas, but not adjudged; but Court thought hard to charge the other. Vide Butcher and Porter's Case, in Time of the late King.

Two Coroners, one Insolvent suffers an Escape, if the other shall be charged. 3 Lev. 399. 2 Mod. 23. 24. Show. 400.

2 Salk. 468.
S. C.

Post 234.
Demurrer
join'd in Pa-
per, and Plea
allow'd to be
changed.
See 2 Sal.
515.

Post 84, 88, 118. Ld. Raym. 856. 1 Barnes 110, 111, 112, 108, 109, 212. 2 Barnes 134.

Godolphin & Ux. *versus* Tudor.

A Demurrer was joined in Easter Term last, and all continuing in Paper, they moved now to change their Plea, and plead a Matter issuable. Per Cur. It is very regular while it is in Paper to change or amend upon Payment of Costs; and Motion was granted upon Payment of Costs.

Lord Harry Scot and Brace, Redmond & al.

If Bail in Er-
ror upon Bond
for Return of
a Ship.

Bond was for safe Return of such a Ship (suppose under 100 l. Penalty) and Judgment thereupon in the Common Pleas, and Writ of Error here; and the Question was, Whether there should be Bail within the Statute: And per Cur. Let there be Bail nisi.

2 Salk. 638.
S. C.

Ld. Raym.
974. S. C.
Trespas for
Breaking his
Close, and
Hunting and
Killing his
Rabbits with
a Continuando.
Skin. 42, 641.
Carthew 230.
Verdict, and
entire Da-
mages.

2 Mod. 253.
5 Mod. 178.
Ld. Raym.
240, 241,
251.
Cas. temp.
W. 3. 24,
519.
Cas. temp.
An. 258.

Obj. That
every Hunt-
ing and Kil-
ling was a
new Trespas.
What things
may be laid
with a Conti-
nuando.

Upon an En-
try with and
without Ou-
ster.

Monkton *versus* Ashly & al.

Trespas for Breaking Plaintiff's Close, Treading his Grass, Hunting and Killing his Rabbits, continuando Trans. præd. quoad all the Particulars diversis Diebus & Vicibus, from such a Time to such a Time: After Verdict and entire Damages: And now moved in Arrest of Judgment by Salkeld, That of their own shewing they had recovered Damages for that for which they ought not to have recovered; for every Entry, Hunting and Killing, was a new Trespas: Vide 2 R. 3. Defendant came every Day upon the Plaintiff's Ground to claim it as his own; and they held he could not be declared against with a Continuando. 21 H. 6. 43. Fitz. Tresp. 51.

Nothing properly can be laid in Continuance but Acts of Duration in themselves, as Nuisance, Stopping of Lights, Water, &c. Feeding of Cattle: These are permanent Things, and have Duration without Intermision, and therefore may be laid with a Continuando. And other Things can by no Means be continued, as Killing a Man's Horse, Cutting a Tree; for there the Trespas terminates with the very Act, and cannot be repeated.

So the Question will be then of Acts that may be repeated, In what Cases they may be alledged with a Continuando? If the first Entry suppose be without an Ouster, the second Entry will be such a new Trespas as cannot be called a Continuando of the first; and a Release of the first will not discharge it: But if the first Act amounts to an Ouster, all subsequent Acts are Continuances of it: Vid. Yelv. 126. 1 Brownl. 223. and he said, Without this Distinction, the Books were not reconcilable: F. N. 91. L. Trespas for Breaking his Close, and Cutting his Grass with a Continuando, it must be understood of an actual Ouster; 20 H. 7. 3. 1 Lev. 210. and 1 Sid. 319. which he said was a wonderful strong Case, and contrary to the Case of Brook *versus* Bishop, Pasch. ult. 2 Roll. Abr. 549.

Answer. As to the Objection, either it is possible or not; if possible, Damages may well be for it; if impossible, the Court will intend the Damages to have been given altogether for that which is possible, and not for that which is impossible.

Resp. How the Damages shall be intended.

Reply. The Damages must be intended given for whatever we are expressly charged with, and all the Particulars of the Trespass are specially and expressly laid in a Continuando; indeed, if he had declared with a Continuando Transgr' præd' generally, the Court would apply the præd' to that which might be continued: But they cannot do it against the express Allegation of the Party, and an Ouster cannot be intended in this Case.

Reply, That the Continuando is special quoad all the Particulars.

Ch. Just. Holt. I cannot see but a Man may lay Entering into his Close, and Hunting in his Warren, with a Continuando of the same, for several Days: It is not indeed one continued Act, that lasts from one Day to another; but it is, that the Defendant has been Hunting there daily, &c. and that is præd' transgr' continued; and I cannot agree the Case in Yelverton, but it was in Favour of the Judgment: But to say, that if Trespass be laid with a Continuando, that answering the original Trespass is of consequence an Answer to the Continuando, seems strange; for the Continuando is a Trespass continued, which ought not to be unanswered. If I say, that such a Day J. S. entered into my Wood, and cut so many Load of Wood, and carried them away, Continuando quoad the Cutting, it is senseless, and so is the Case of 1 Lev. and 1 Sid. which you deny as to the Throwing of the Logs; and when such Trespasses that lie not in Continuando are laid with a Continuando, the Judge ought not to suffer any Thing to be given in Evidence but the first Act.

Ch. J. That the Continuando might be.

2 Salk. 638, 639.

1 Lev. 210.

1 Sid. 919.

Powel. Why may not the Hunting lie in Continuance, as well as the Feeding of Cattle; for as a Man cannot hunt Night and Day incessantly, so cannot a Beast feeding; nor is the Feeding yesterday the same identical continued Feeding in your Sense of Unintermission: Yet Trespass Quoad Depasturac'on, is frequently laid with a Continuando; but Cutting a Tree cannot, or Killing so many Rabbits such a Day Continuando, or entered and took away so many Loads of Corn such a Day, you cannot say Continuando; but the Way is to say, that such a Day the Defendant entered, and did so and so; and diversis Diebus & Vicibus, between such a Day and such a Day he did, &c. and in these Cases there ought to be no Evidence but of single Instance, and the Jury can give no Damage but as far as their Evidence: And so are the Cases of H. 7. and R. 3. which you quoted.

That the Hunting may lie in Continuance.

But Killing the Rabbits may not.

How the Continuando ought to be laid.

And as to the Ouster, Holt, Ch. J. took this Difference: If you lay an Ouster in your Declaration, you must lay a Re-entry, or else you cannot recover the mean Profits; but if you enter, you may lay it with a Continuando if it will bear one, and recover Damages for the Entry and mean Profits. And at another Day the whole Court held

Upon an Ouster a Re-entry must be laid. 1 Inst. 257.

Here the *Continuando* held well laid, and Judgment *pro Quer.*

See Carthew 144, 230. Skinner 42, 641.

Post 57. S. C.

Dissolute Person kill'd Hares, and Indictment quash'd because not laid Not qualified. Cal. temp. Mac. 26, 27.

held it well, and said, That a Trespass for Prostrating a Bench with a Continuando was held good, so conculcavit & assumpsit lies in Continuance; cutting certain Quantity of Wood lies not in Continuance; but to lay that well Vide 31 H. 6. but this here is relative to no Quantity, but a Continuance of a small kind of Trespass; if it had been, that he killed three Rabbits that Day Continuando, it had been bad; so if for Cutting 500 Loads of Corn such a Day, and they in that Case can give no more in Evidence than what was on that Day. Jud' pro Quer.

Domina Regina *versus* George.

A Conviction upon the Statute of 4 & 5 W. & M. was, That the Party, Existens dissoluta Persona, did hunt and kill so many Hares; and quash'd, for that it was not laid, That he was not qualified; for there are many dissolute Persons worth 2000 l. per Annum, and by Consequence are qualified to hunt, &c.

Ld. Raym 583, 1415. Stra. 679.

Special Justification.

And if there be a Special Justification, that must be of Matter of Fact, and not of Record; for Matter of Record must be pleaded even by an Officer.

Quashing Writ of Inquiry. Ld. Raym. 1142.

Order removed by Certiorari, on which Appeal lies. Cal. temp. W. 3. 646.

Ch. J. Holt. Writ of Inquiry cannot be quashed, till it be returned and filed; but before Return it may be superseded, quia im-provide emanavit. See the Cases cited post 43.

If an Order be removed by Certiorari on which Appeal lies, before Appeal it ought not to be filed till the Court is informed of the Matter; and then they will grant a Procedendo, notwithstanding the Certiorari. Holt Ch. Just. Vide post 43, 83, ante 33.

Shepherd and Bailey *versus* Orchard.

Where two brought Error, and made two Attornies. 1 Lev. 146. Vide 1 Salk. 86, 88. Stra. 783.

Nul tiel Record.

They Two brought a Writ of Error, and made two Attornies upon the Sci. fac': The one Attorney assigned Error; to which the Defendant took Issue, and then the other would plead in Abatement of the Writ. Per Cur. If one of the Plaintiffs had made Default, he should be severed; but if they go on, they must proceed jointly; and if one Attorney will assign Error, &c. without Authority from both, we cannot help him, let him take his Remedy against the Attorney.

Note; If a Record of this Court be pleaded, Nul tiel Record, without more, is a compleat Issue.

Domina Regina *versus* Dyer.

HE was convicted upon the Statute of 7 Jac. 1. cap. 7. for imbezilling Yarn delivered to him to be woven, and the Conviction begun; Whereas Complaint hath been made before us *A. B. &c.* Justices of the Peace in *C.* by *J. S.* That on such a Day; and sets forth the Charge: It further sets forth a Summons made by them to bring him in; and that by Vertue thereof he appeared before them on Tuesday the 17th of April in the Year 1702.

1 Salk. 181.
S. C.
Qu. post. 96.
Conviction for
imbezilling
Yarn.

The Objection was made, That a Summons is essential in the Case; and that here it did appear on the Face of the Conviction, that there was no Summons, for the Summons shewn is impossible, there being no such Day as Tuesday the 17th of April that Year; for the 17th of April that Year was on a Friday. To this it was offered for Answer, That the Order had been good without setting that Matter forth; for Things incident to a Jurisdiction need not be set forth, but Things accidental must: Vide 2 Bulst. 48. 9 H. 6. 44. Return to Habeas Corpus, directed to the Chancellor of Oxford, that he was a Justice of Peace, &c. and that the Party was convicted before him for Extortion, without setting forth the Manner.

Obj. That a
Summons is
essential, and
here it is im-
possible.
Ld. Raym.
1546.
Caf. temp.
Mac. 213.
1 Mod. Caf.
in L. & Eq.
3, 63, 64, 208,
238, 309, &c.
378.
Stra. 261, 316.
67, 919, 546.

1240, 608, 1101, 794, 915, 937, 1181.

Objection. Though perhaps it needed not have been set out, yet if you go about it, you must do it well at your Peril. Answer. What is said, is only under a [whereas] and by way of Recital; and the Words do not say, That he did not appear; but say, That he appeared at a Day impossible; which does not exclude an Appearance at a Day possible: And according to the Rule, in Alton Wood's Case, and Plow. 32. that which need not be shewn, if shewn ill, shall not vitiate. Vid. Dyer 95. Ray. 192. 2 Jo. 50. 12 H. 7. 12.

And if need-
less, yet if set
out, it ought to
be done well.

Ch. Just. Holt. Of common Right the Party ought to be summoned, if possible; and it would be well to set forth, That he was summoned and appeared, or did not appear, or could not be found to be summoned; and tho' the Act of Parliament orders the Offender should be convicted, yet that must be intended after Summons, that he may have an Opportunity of making his Defence; and this summary Jurisdiction ought to be held strictly to Form, and every Thing ought to appear regular in them; and they ought to make a Memorand. that such a Day Complaint had been made, that thereupon a Summons issued returnable such a Day, and that the Party being summoned did or would not appear, or could not be summoned, &c. and it is abominable to convict a Man behind his Back. And all the Court agreed, that of common Right there ought to be a Summons; and that the Almanack is Part of the Law of England, of which Court must take Judicial Notice; and that nothing could make this good but an Intendment, that the Justice would not convict one without a Summons.

Ch. J. That
Party ought to
be summoned,
and how it
ought to be
set forth, &c.

Per Cur. There
ought to be a
Summons, and
that the Alma-
nack is Part of
the Law.

1 Lev. 242.
Vide post 81,
160, 252.

Powel.

Ld. Raym. 4, 281, 870, 1557, 1546, 1544.

M

Conviction
quashed *per*
tot. Cur.

Powel said, That if Action were brought against an Officer upon Execution of this Conviction, it would not lie, for an erroneous Conviction would justify him: Indeed, if you had shewed no Summons, perhaps he would intend one, according to Precedents; but here you shew a Summons, and an Appearance at a Day impossible: And he said my Lord Hale used to say, There ought to be a Summons: And for the said Objection, the Conviction was quash'd *per tot' Cur'* the last Day of Hilary after.

Constable.
Ld. Raym.
138.

Per Holt, Ch. Just. No Man that keeps a Publick House, ought to be a Constable.

Upon an At-
torney's Pro-
mise to appear.
Vide postea
86. ante 16.
Cas. temp. W.
3. 251.
3 Wms. 277.

Note; If before a Writ be taken out, an Attorney promise to appear to it, and after it is taken out, and shewed to him, he ought to appear, but that is no actual Appearance; but if such Undertaking be after Writ is actually taken out, it is an Appearance; *per Holt, Ch. Justice.*

1 Barnes 1, 32. Stra. 114, 402, 693.

Vide post 61.
105, 301.
Indictment for
Cheating upon
a Foot-Race.
See 2 Show.
341.
Ld. Raym.
865.

Domina Regina *versus* Orbell.

Indictment was for fraudently, and per Conspirationem, to cheat J. S. of his Money, got him to lay a certain Sum of Money upon a Foot-Race, and prevailed with the Party to run booty: And Court would not quash it upon Motion; for they said, That being a Cheat, though it was private in the Particular, yet it was publick in its Consequences.

Of Bail to try
it, and when.

And note; After this the Defendant would not plead till he was served with a peremptory Rule; and for that by the Course of the Court his Plea ought not to be received without Bail to try it the same Term: Whereas if he had pleaded freely, he need not try it till the next Term. And ordered *per Cur.* to give Bail to try it this Term, or the Sitting after.

2 Salk. 659,
S. C.
Ld. Raym.
966. S. C.
Nul tiel Record.
Record Re-
cognizance,
which was
taken at a
Judge's Cham-
ber, and set
forth as if taken
in Court.
Ld. Raym.
84, 757, 819,
1141, 1170.
Cas. temp. An.
4, 45, 53, 223,
224, 253.
1 Mod. Cas.
in L. & Eq.
290.
1 Wms. 334,
336, 340.

Chetley *versus* Wood.

In Debt upon a Recognizance, the Plaintiff set forth a Recognizance knowledged in Court of Common Pleas before Sir George Treby & Sociis suis: And upon Nul tiel Record pleaded, the Record was produced, and was a Recognizance taken before Justice Nevil in his Chamber in London, and brought by him and delivered into Court after at Westminster; and whether this were a failure of Record, was the Question? It was agreed, that the Recognizances in this Court are always entered as present in Court, and never mention a Day certain; but in Common Pleas they make an Entry of a Recognizance entered into at a Judge's Chamber on a Day certain, and there it binds Land from the very Day of the Caption, and a Sci. Fac. may be brought upon it in either County, that is, London or Middlesex.

And

And being moved again at another Day, it was offered, That it was a constant Practice in Common Pleas, for above these 20 Years to recite Recognizances taken at Judges Chambers, as taken in Court.

To which Holt, Ch. Just. answered, then they must make their Entry so, or else their Usage is contrary to Law, and not to be regarded; but here the Entry is made, that the Recognizance was taken in London before a Judge in his Chamber: And per tot' Cur', *Per Cur', Here was a Variance.* Vide Hob. 195, 196.

Certiorari was directed to Justices of the Peace to remove an Indictment of Forcible Entry, and the Return was void. Per Cur', *Certiorari, and void Return.* The Justices Names need not be subscribed to it, but it should be Responsio Justiciar' &c. patet, and it should be Domine Regine; but before this was discovered it was filed, and the Recognizance into which the Party had entered, for laying the Cause in pursuance of late Act of Parliament was estreated; and the Court said, that if the Party that removes Indictment by Certiorari don't enter into Recognizance to try it the next Assize or Term, or the Sitting within the Term, the Certiorari is no Superfedeas. 2. That Failing of Trying is a Forfeiture of Recognizance, after which they will not hear a Motion in Arrest of Judgment; but they doubted whether this for Want of due Return, being a Kind of Album Breve, why they should order the Justices to make a Return, and respite the Recognizance in the mean Time. *Ante 33. Failure is a Forfeiture of Recognizance. Dubitatur.*

Caf. temp. Mac. 153, 278. Ld. Raym. 1515.

Note; After Certiorari returned and filed, no Procedendo can go. *No Procedendo after Certiorari filed.* Per Cur'. Vide antea 33, 40, post 83, 61.

Per Cur', If a Number of Persons meet peaceable on a lawful Occasion, and a sudden Fray happens between them, it cannot be made a Riot; but if several meet upon an unlawful Occasion, and a sudden Fray happens between them, and a Person who came upon a lawful Occasion joins in the Fray, it may make him a Rioter as well as the rest. *If Riot upon Persons meeting and a Fray happens.*

Per Holt, Ch. J. You cannot except against a Juroz upon a Writ of Inquiry. See of Writs of Inquiry, Carthew 70, 86, 362, 371, &c. *Exception against Juror. ante 40.*

Indictment for exercising Artem, Mysterium, sive Occupationem des les Taylors, not having served, &c. quashed. *Vide Hob. 183. this Exception taken and rejected.*

Queen versus Croffe.

HE confessed on Interrogatories, that a Copy of a Writ being served on him, and the Writ shewed, that before he knew the Contents of it, or out of what Court it was, he had spoke with Contempt; and this was judged a Contempt. *Confession of a Contempt. Post 74. Faresl. 31. Ld. Raym. 1364. Caf. temp. W. 3. 374, 499, 511. Stra. 567.*

4 Mod. 47.
Vide 5 Mod.

327, 328.
2 Salk. 451.
Case against an
Apothecary for
practising Phy-
sick without
Licence. Spe-
cial Verdict.
2 Show. 158.
Caf. temp.
Mac. 353.
354.
Comyns 79.

College of Physicians *versus* Rose.

IN an Action for practising Physick within Seven Miles of London, without Licence: The Case upon a special Verdict, That the Defendant being an Apothecary by Trade, was sent to by J. S. then sick of a certain Distemper; and he having seen, and being informed of the said Distemper, did, without Prescription or Advice of a Doctor, and without any Fee for Advice, compound and send the said J. S. several Parcels of Physick as proper for his said Distemper, only taking the Price of his Drugs; and if this were a Practising of Physick, such as is prohibited by the Statute, was the Question: And after several Arguments, the Court at last unanimously agreed, That Practising of Physick within this Statute, consists,

What is pra-
ctising Phy-
sick within
the Statute.

1. In judging of the Disease and its Nature, Constitution of the Patient, and many other Circumstances.

2. In judging of the fittest and properest Remedy for the Disease. And,

3. In directing or ordering the Application of the Remedy to the Diseased: And that the proper Business of an Apothecary is to make and compound, or prepare the Prescriptions of the Doctor pursuant to his Directions.

Judgment *pro*
Quer, but re-
versed in Par-
liament.

2dly, It was agreed, That the Defendant's taking upon himself to send Physick to a Patient as proper for his Distemper without taking ought for his Pains, is plainly a taking upon himself to judge of the Disease, and Fitness of Remedy, as also the executive or directing Part. Et per tot' Cur', Plaintiff had Judgment.

Note; This Judgment was reversed in Domo Procerum, & iuste, &c.

1 Salk. 285.
S. C.

Ford *versus* Lord Grey.

See 5 Mod.
385, 6.
2 Jon. 27.

In Ejectment
Possession of
one Jointenant
is Possession of
the other.

Ld. Raym.

741, 830.

Caf. temp.

W. 3. 657.

How to prove
an Entry and
Claim.

Vide Hob.

120.

1 Inst. 199,

181, 376, 377.

Recital of a

Lease, Evi-

dence of a

Lease.

Vide 2 Lev.

108, 109.

AT a Trial at Bar in Ejectment, the Statute of Limitation being pleaded, these several Points were ruled upon Evidence:

1. That the Possession of one Jointenant is the Possession of the other, so as to prevent the Statute.

2. That in proving an Entry and Claim, it is necessary;

1. To prove the Claim to be upon the Land claimed (without special Cause.)

2. That it be Animo clamandi.

3. A Man makes an Answer in Chancery prejudicial to his Title, and after conveys away his Estate, this Answer cannot be read against the Alienee by any Claiming under Alieno.

4. That the Recital of a Lease in a Deed of Release, is good Evidence of a Lease against Releasor, and those that claim under him.

5. A Fine was produced, but no Deed declaring the Uses; but a Deed was offered in Evidence which did recite a Deed of Limitation of the Uses; and the Question was, Whether that was Evidence? And the Court said, That the bare Recital of a Deed was not Evidence; but that if it could be proved that such a Deed had been, and lost, it would do if it were recited in another; and it not being proved that ever there was a Deed leading the Uses of the Fine, the Counsel of one Side opposed the same Deed of Recital's being at all read: But the Court said, We cannot hinder the Reading of a Deed under Seal; but what Use is to be made of it, is another Thing.

Upon bare Recital of a Deed of Uses upon a Fine, Proof to be made.
Prec. Chan. 59, 64, 116.
Ld. Raym. 154, 746, 801.
Caf. temp. W. 3. 24, 231,
494, 579, 339.
Caf. temp. Mac. 42, 43, 8.

6. A Deed bore date 22 Car. 2. Anno Dom' 11671. and notwithstanding that Mistake, the Year of the King being certain, it was well.

Anno Dom' mistaken.

7. If there be two Jointenants in Fee, and one of them levies a Fine of the whole, this amounts to no Ouster of his Companion, but it is a Severance of the Jointure, tho' he be in of the old Use again; as if a Man seised of a Manor levies a Fine of the Demeans, the Manor is gone for ever: Sir Moyle Finch's Case; and after the Fine, tho' he has the same old Estate, yet he has it in another Manner; for the Fine being sur Conuzance de Droit come ceo, presupposes a Feoffment; and if one seised as Heir to the Mother, levy Fine sur Grant and Render, the Estate shall go to the Part of the Father; otherwise of other Fines.

Preced. Chan. 124.
Caf. temp. W. 3. 96, 657,
658.
Caf. temp. Mac. 163,
444.
Stra. 12.
Fine by one Jointenant of the whole Fee.
Vide & Nota Hob. 27.

8. A Deed of Title to Lessor of the Plaintiff of a Will, (suppose, except Black-acre) the Statute of Limitation being pleaded, and an Entry and Claim being offered in Evidence to avoid it, they were put to prove the Entry to have been in another Place than was excepted.

Fine by Heir of Mother.
Ld. Raym. 750.
Entry upon an Exception.

Ashbey *versus* White.

Ld. Raym. 938. S. C. 1 Salk. 19. S. C. & vide 2 Salk. 503,

In Case, the Plaintiff declared, That one Day of December, 12^o of the late King, there issued a Writ to Sheriff of Bucks for Election of Members of Parliament in his County, that the said Writ was delivered to the said Sheriff; whereupon the Sheriff made his Warrant to the Constable of Ailesbury to choose two Burgesses for that Borough, which Warrant was delivered to the said Constable; that in pursuance thereof the Burgesses were duly assembled to choose, &c. That the Plaintiff being then duly qualified to give his Voice for the Election of two Burgesses before the said W. he was ready to give his Voice for L. and B. to be Burgesses of Parliament for the said Borough; and that the Defendant knowing the Premises, with Malice, &c. did obstruct him from giving his Voice, and did refuse it, and not allow or receive it, and that two Burgesses were chose without allowing or receiving his Voice: Verdict pro Plaintiff. And now the Court argued seriatim, three against the Plaintiff, and Holt, Ch. Just. totis Viribus for him.

504.
5 Mod. 311,
312.
1 Mod. 145,
146, &c.
2 Lev. 114.
3 Keb. 365,
389, 664.
Pollexf. 470.
Farell. 13.
Post 49.
Case upon a Writ for Election of Members of Parliament.
That Defendant obstructed him from giving his Voice, &c.

Ld. Raym. 907, 908.
Caf. temp. W. 3. 26.
Caf. temp. Mac. 54.

Gould

N

Argument a-
gainst Plaintiff.
1. The Con-
stable in this
Case is Judge
of Sufficiency.

Vide postea.

2. 'Tis a Par-
liamentary
Offence, with
which Court
hath nothing
to do by way
of Action.

'Tis *Injuria
fine damno*, &c.

This relates to
the Govern-
ment, and is a
kind of popu-
lar Offence.

How it may
be proper for an
Information.

Remedy in
Parliament,
&c.

Gould, paise Justice, against Plaintiff, for four Reasons:

1. The Constable in this Case is Judge who shall vote or not, and as such not be liable to Actions; as Sheriff shall not be liable to Action for taking insufficient Bail, because he is Judge of their Sufficiency: Hut. 120. 21 Car. 2. in B. R. Rot. 469, Action for taking Bail, having nothing in the County, does not lie. Lev. 6. Escape upon Process, Defendant pleads, that he let him go upon sufficient Bail, and held that the Sufficiency of the Bail is not traversable: 2 Mod. 218. Jury fined for Verdix against Evidence, and held ill: 9 H. 6. 6. Judge not liable to Action for making up a false Record.

2. This is a Parliamentary Offence, with which we have nothing to do by Way of Action; for we cannot examine, whether the Party refused has a Right to vote or not, for that properly belongs to the House of Commons to determine; and suppose the Question be, whether the Right of Voting be in a select Number, or in the Populace? And the Defendant refused the Plaintiff for being of the Populace; and we judge him to Right of Voting, being of the Populace, and upon that Ground give Judgment for the Plaintiff, and after the Right of Election in that Borough comes in question in Parliament, and there the Right is adjudged to be in a select Number; this will occasion a Concurrence of independing Jurisdictions, which will be wonderful inconvenient; vide 2 Vent. 87. that even for false Return it does not lie, for no Precedents are of any before Stat. of H. 6.

3. Here is no Profit present, or Possibility of a future Profit, so it is an *Injuria fine damno*, and *damnum fine Injuria*, or Vice versa will not bear an Action, for both must necessarily concur to maintain the Action; for Things must not only be done amiss, but it must redound to the Prejudice of him that will bring his Action for it: 19 H. 6, 24. If a Man forges a Bond in my Name, it is possible I may be damnified by it; but till it be put in Suit against me, I cannot bring Action against the Forger: Hob. 267. idem, 6 Edw. 4, 7. 2 Bulst. 268.

4. This relates to the Government, and is a kind of a popular Offence, and for that an Action will not lie for it; for by the same Reason that an Action would lie for the Plaintiff, it might lie for 200 upon the same single Question; and suppose we all should give Judgment in so many Actions against him, and after the Matter is decided otherwise in Parliament, what Remedy has this poor Officer? And the avoiding Multiplicity of Actions, is the Reason of Fitz-William's Case, 5 Co. and Boulston's Case in the same Book, that Actions lie not by any particular Person against one that not being qualified builds a Dove-cote, but is punishable in the Leet; but I do not say but that after the Right is determined in Parliament, it might be proper for an Information, 2 Brownl. 194. 2 Cro. 268. upon the same Reason: As to the Reason that such Action never has been, therefore it don't lie, I do not much depend upon it: Vid. 2 Cro. Guntley *versus* Holmes, 2 Vent. 25. 2 Lev. 2, 250. there is no Remedy there for the Party grieved but an Action, but here is Remedy in Parliament: Besides these Reasons, it is not alledged that any Return was

was made of the Members chose without his Consent or Note, and ^{Post 122.} Action does not lie to be sure before Return, 2 Bulst. 255. for till then the Party has no Damage.

Powys accord. For these Reasons :

1. The Officer in this Case, tho' not properly and strictly a Judge, ^{Pro Def.} yet he is quasi a Judge ; for he has a distinguishing Power who shall ^{1. That the Officer is quasi a Judge.} be admitted to vote, and who not ; not indeed finally and conclusively, but at that Time who to admit, and who to refuse ; but all he does is obnoxious to a subsequent Examination in Parliament.

2. If such an Officer misbehaves himself, in certain Cases Acts of ^{2. Remedy by Acts of Parliament.} Parliament have already given Remedy ; and this Case may come incidently in Question, and be determined upon such Actions as the Statutes have provided ; and the Statute giving Remedy in one Case, and being silent in all other Cases, seems to expound the Common Law in this Point.

3. This would subject Mayors and such Officers, to such Infinity ^{3. This would make infinite Actions against Officers to their Ruin, &c.} of Actions, as would not only ruin them, but also deter every Body from exercising the like Office : For the Heats in Elections are so great, that the losing Party would never fail of bringing every Man his Action, which the Court could not join in one, and so the poor Officer would be undone : Whereas the whole Matter might be fairly determined by an Action for false Return by either Candidate, according to the Statute.

4. There is such Intricacy in Elections, that scarce any two ^{4. Great Intricacy in Elections, &c.} Towns agree ; in some Boroughs a select Number has the Government ; in some all that pay Scot and Lot, in some Pot-wallahs, or House-keepers, &c. So that it would be hard to make an Officer distinguish them at Peril of Action.

Objection. By Law every Man that has an Injury done him, ^{Ob. 'Tis a Wrong.} ought to have a Remedy therefore ; and it would be strange to tell an English-man, That he has a Wrong done him, and no Redress for it.

Answer. This is no Wrong to him, for he does not lose his Pri- ^{Resp. 'Tis no Wrong ; he may be righted upon Petition.} vilege of Voting by it ; for if an Action be brought for a False Return, or a Petition preferred to the House, if he has a Right, the House will reckon his Vote as much as if it had been received at the Election ; and besides, if it be an Injury, it may be one of those that come within the Rule, de minimis non curat Lex : Moor 842. 2 Cro. 368. 1 Roll. Rep. 125. 2 Bulst. 326. and the Stat. of 7 & 8 W. 3 Lev. 30. that the Party elected before the Stat. of 27 H. 6. had no Remedy in Case of false Return, and before the Stat of 7 & 8 W. Vide Case of Anslow in 3 Lev. and 2 Vent. no Action lay for a double Return.

5. Reason : That such an Action was never brought before, and ^{That such an Action was never brought before.} then Littleton's Argument on the Statute of Merton, vid. Cro. 142. which though it be not a conclusive Reason, yet thus far it may be urged, That it shews the Law is not apt to encourage Actions where none was brought ever before ; And it is said in Anslow's Case, That the

the Parliament could not be misconusant of double Returns, & ideo, if they had thought it convenient, they would have provided a Remedy. It may in like Manner be said here, they could not be misconusant of denying of Burgeses their Votes.

That such Disputes properly belong to the House to determine.

6. The Determination of all Disputes concerning Elections does properly belong to the House to determine, and it is a fundamental Right of theirs to determine who are to be the constituent Members of their own Body; and the right Decision of these Things depends upon a Parliamentary Kind of Learning, whereof most People are ignorant, as we may see by their being daily decided within the House contrary to the Opinions of all People out of Doors: And now in Actions for false Return, the last Determination in Parliament is what we must be concluded by.

It would be a Clashing of Jurisdictions.

1 Vent. 206.

2 Vent. 25.

2 Lev. 50.

Post 55, 100.

& infra.

3 Lev. 29.

2 Lev. 114.

7. The Clashing of Jurisdictions that would be.

And concludes for Defendant.

And as to the Case of Starling and Turner, it is not like this; for that depended on a private Custom of a Corporation, and this here is Parliamentary: And he quoted 2 Vent. 37. That Courts of Westminster-Hall must not enlarge their Jurisdiction. 2 Bulst. 368.

As to the Pleading, tho' he agreed it would be bad on Demurrer, for the Generality of the Allegation, that he was ready to give his Vote, and that they hindered him, &c. yet after Verdict he held it well enough, and he concluded for the Defendant.

Powell. At the first Opening of this Case, I was surprised with the Novelty thereof, but that is no Reason against it; for many Actions are daily brought, the like whereof was never brought before.

That the Officer is only a Minister, and the Injury will not maintain an Action.

I don't agree with my Brothers, that the Officer here is a Judge; nor do I know what quasi a Judge is: Sure this Officer is only a Minister to execute the Sheriff's Precept.

Vide supra 2 Lev. 50.

But what moves me to be of Opinion against the Plaintiff is, that this is not such an Injury or Damage to the Plaintiff as will maintain an Action on the Case; for Injury is in Relation to some Right a Man has, except it be where a Man is hindered from trying whether he has a Right or not, as was the Case of Turner versus Sterling; and the Case of Forge and Hoskins was upon solemn Debate, and it was compared to the Case of Cestuy que use, who could not maintain Case against Feoffee, for not executing Possession. However, let that Case be how it will, it does not oppose the Case of Sterling; for there was an old Remedy in Chancery to compel the Lord to hold his Court, in that Case; and in the other, there was no Manner of Remedy but an Action upon the Case.

That the Jury are not Judges whether he has a Right, but the Parliament.

Objection. The Party here shews he has a Right, and the Jury find it upon their Oaths.

Answer. His own Allegation does not give him a Right, and the Jury are not Judges whether he has Right or not; for it is a Matter solely inquirable and determinable in Parliament by their Committee of Election, whether their Members be chose as they ought to be, and

and what is that but to determine the Right of Voting? And there is no Doubt but they have Conscience of that Matter.

Objection. The Determination of the Right in Parliament does not avail the Party injured of his Vote; nor repair him in Damages.

This Action ought not to be till the Parliament has determined his Right.

Answer. At least you come too soon for this Action, before it be determined in Parliament whether you have a Right; and indeed, if it may be called a Right, it is so dubious and uncertain a Right, that it is extream hard to say, till it be determined, that a Man may be injured in it so as to bear an Action; and the Plaintiff has a proper Remedy, if he has a Right, by Application in Parliament; and when the Matter is there determined, he may then bring his Action for his Damages; for I agree, it would be hard to suppose an Injury without a Means for a Reparation in Damages.

Vide ante 45.
2 Lev. 50,
114.
2 Keb. 435.
Pollex. 470.
2 Keb. 356,
664, 433.
Lutw. 88,
89, &c.

There be but few Cases in our Books to this Purpose, but the Case in Hob. 318. comes up to the Reason of it: If a Church becomes litigious, so that there are two Persons in Contest about it, the Ordinary's safe Way is to ascertain the Title by a Jure Patronatus: If after, he admits the wrong Person, contrary to the Inquest of the Jure Patronatus, and the rightful Patron recovers in a Quare impedit, he shall after have Case against the Ordinary, but not before the Right is determined in a former Action. So here you should ascertain your Right in a proper Way, and then bring your Action: And there is great Reason for this, for the Right may be determined quite contrary by Parliament; and if we give Damages and Judgment against the Defendant, and after the Matter comes before the Parliament, who determine against the Plaintiff, what Remedy has the Defendant? This is a monstrous Mischief, only to be prevented by staying till the Matter be determined in Parliament.

Besides, as it appears on the Declaration, there is not sufficient Damages to maintain it; for every Injury, to maintain an Action, must have a real present Damage, or a Possibility of a future one: As where one has a Market and Toll, and another is coming with Goods to the Market, for which, if sold, Toll would be due, and a third Person hinders him from coming to the Market: Action lies for Lord of the Market, because of the Possibility of Damages.

Possibility of Damages.

Another Fault in the Declaration is, That he does not particularly tell how the Defendant obstructed him, as that he shut him out; and tho' it be after Verdict, yet the Declaration must be so certain as to be substantial: For if Action be brought by him in Reversion, for refusing to let him come upon the Ground to see Waste, and he only says he obstructed him, and does not shew how, Verdict will not help it.

Shews not how the Defendant obstructed him, and not helped by Verdict.

Objection. It is Penitus recusavit.

Answer. Indeed if it were a Thing that lies in Demand, as a Rent-seck, there Demand and saying Recusavit is enough; but here he says, He refused his Vote. What then? If he gave it, it is nevertheless a Vote for the Officer's refusing it; and if there were Room

Also, it is a Vote if he gave it.

to controvert it, it would have been looked upon as much a Note as if it had not been refused.

The Plaintiff's Right has no Profit in it, &c.

That an Action may lie where the Party has no other Remedy.

Then this Right of Voting has no Profit in it, and it is as criminal to take Money for it as to sell a Presentation, as far as I can see; yet there was no Damages in Quare impedit at Common Law; therefore why here? And if so, no Action ought to be.

The Multiplicity of Actions, which Law will never suffer but upon Failure of other Remedy, and that is the Reason of the Case of the Common Watering-place in Southwark, because there was no other Remedy; but if an Indictment would have lain, no Action would have been maintained there; but here is another Remedy; and he agreed, the Case of Hemming and Finch, that Action will lie for refusing a Freeman his Vote in choosing a Mayor, but there the Party has no other Remedy: Besides, this would be a great Discouragement to sober discreet Men to meddle with these Offices, and the Difficulty of Elections, and Right of Voting, in some Corporations is very great. So being an Action of the first Impression, attended with many Inconveniences, and the Right determinable elsewhere, I am against the Plaintiff; but after Right determined in Parliament, for the Trouble and Charge the Party is at in prosecuting his Right, Action may lie.

Holt Ch. J. pro Quer.

Holt, Ch. J. The Case is truly opened and stated, and the only Question is, Whether or not, if a Burgess of a Borough, that has an undoubted Right to give his Vote for the choosing a Burgess of Parliament for that Borough, is refused and obstructed from giving his Vote; whether, I say, he has any Remedy in the King's Courts for this Wrong against the Wrong-doer?

That the Action is well maintainable.

All my Brothers agree, That he has no Remedy; but they differ in their Reasons; I can't agree with them, for I think the Action well maintainable; and first, I shall consider the Reasons given by my Brothers. The first Reason given by my Brother Gould is, That this Officer is a Judge of the Matter, and therefore no Action lies against him; but Brother Powys does not wholly concur with him in that; he says, He is only quasi a Judge: But Brother Powell thoroughly explodes that Reason, and says, He is neither a Judge, nor any thing like a Judge. And certainly he is in the Right of it, for he is nothing like a Judge; for what has he to do as Judge? The Sheriff receives the Writ, and is commanded to execute it, and thereupon he makes a Precept to the Officer of the Borough by Virtue of the Writ; and what has he to do, but to call the Town together, and give them Notice to come and make their Election, and then to receive their Votes and cast them up, and return him chose that has the Majority? And all this is purely ministerial.

Method of maintaining his Opinion,

But the Method that I shall observe in maintaining my Opinion is,

1. To shew that the Plaintiff has a Right and Privilege to give his Vote.

2. That

2. That in necessary legal Consequence of this Right, if he be hindered or obstructed in the Exercise or Enjoyment of it, the Law gives him an Action.

3. That this is the proper Action the Law gives him to vindicate his Right, and recover Damages for the Injury done.

I did not think it difficult to prove, that he has a Right; but it may be necessary to shew, that he has a Right vested in him to maintain this Action. As to the Plaintiff's Right.

It is not doubted but that the Commons of England have a considerable Property in the Estates of the Land; and that for that Reason they have a great Part of the Legislative Authority, without whose Consent no new Law can be made, old ones abrogated, or Taxes given: But because the vast Number of which the Community is made, renders it impracticable for them all to exert this Right; therefore by the Constitution of the Land, they are to send particular Members chosen by and from themselves to Parliament, who when they are chose, they have the full Power and Authority of those that sent them; that is, Knights for Shires, Citizens for Cities, and Burgeses for Boroughs: These are the three Sorts of Persons qualified to have this great Trust reposed in them. And Property, &c. of the Commons of England.

First; As to Knights of Shires, the Election of them belongs to the Freeholders of the County; and this is an original Right vested in them, and inseparably incident to their Freehold; and a Freeholder cannot be deprived of this Right no more than of his Freehold: And before the Statute of — H. 6. c. 7. any Man that had a Freehold of ever so small a Value, had a Power to give his Vote at the Election of a Knight of the Shire; and that Statute recites the Dischies thereof, and confines that Power to a Freehold of 40 s. per Annum: Yet tho' it be confined to that Value, and inferior Freeholders excluded, still it remains an original Right to the Freehold of those that have a Right of Voting, or that have Freehold above 40 s. or of that Value per Annum. As to the Election of Knights of Shires.

The Second Sort is of Citizens and Burgeses: I put them together, because they both are upon the same Foundation; and no Difference between them, but only that a Citizen is of greater Dignity: In all other Things they agree. As to Citizens and Burgeses.

Now there are two Sorts of Boroughs: The First, where the Electors give their Votes in respect of their Burgages. Two Sorts of Boroughs.

The Second, where they give them as Members of the Corporation.

The first Sort, that vote by reason of their Burgage, do it as Freeholders of Houses within the Borough by Burgage-tenure of the Lord of the Borough, which is a very ancient Tenure, and holds Place in the most ancient Towns in England, and sends Burgeses to Parliament, and the Right of choosing Burgeses to Parliament is incident to every Tenant in Burgage: Vid. Litt. 1. Freeholders.

162. So that it is Part of their Constitution, whether incorporated or not; and the Borough in question is a Borough not incorporated, and therefore this Right is upon Account of their Inhabitaney, and not Part of their Tenure, but a Privilege annexed to their Burgage-Lands, and is a real Right belonging to their Estate.

2. Members
of a Corpo-
ration.

The other Sort is, when there is a Corporation by Charter or Prescription, that Corporation by Consequence does choose and send Members to Parliament; and whereas this Right, in those that hold by Burgage-tenure, is a real Interest annexed to their Estate and Inheritance in those that do it as Freemen of a Corporation either by Charter or Prescription, it is a personal Privilege, the Inheritance whereof they have by their Charter or Prescription in such manner as the Charter or Prescription directs; which Right and Inheritance is lodged in Point of Right in the whole Body Politick, tho' the Exercise and Possession be in particular Members pursuant to the special Directions and Limitations of the Charter, or Usage of the Prescription.

Corporation
begun within
Time of Me-
mory.

If the Corporation be begun within Time of Memory, it must be by Grant, and he quoted the Case of the Town of Dungannon in Ireland, 12 Rep. 120. Hob. 15. The Town was Incorporated by the Name of Provost, Free Burgesses and Commonalty, &c. Et ulterius, that the said Provost and Free Burgesses should choose Parliament-men; and held on Debate, that the last Clause vested the said Privilege in point of Interest in the Corporation, but confin'd the Exercise to the Provost and Burgesses: So let the Exercise be according to the Charter or Prescription, either in some particular Members or in all, still the Right and Interest is in the whole Corporation: I do say, this is a distinct and particular Right vested in every Member of the Body Politick, tho' the Exercise be in a particular Number; for if we but consider the Matter seriously, it is they whole Persons, Estates and Liberties, are put in the Power of the chosen Member, that ought to have the Right of voting for, and choosing such Member, vested in them, and it is not quatenus they are a Corporation that they can give this Power to bind their Property, but it is as they are particular, private, natural Persons: As in London, the Body Politick do not pretend to the Right, but it is in all the natural Members that compose the Corporation, tho' exercised by a select Number; and sure the Freemen of England have too considerable an Estate in this Right, to have it only lodged in a Body Politick; and when Parliament-men were paid Wages, it was paid not by the Corporation, but by the whole Community: 46 Ed. 3. Memb. 4. upon the Back, there is a Writ directed to the Mayor and Aldermen of N. commanding them to raise from the Community of the whole Town; and Abundance of other Writs there are in like manner for raising the Salary of Parliament-men of the whole Community; and not of the Corporation: Which sufficiently shew, that the Corporation only is not represented, but also all the whole Community; for none ought to contribute but who is represented.

Privilege in
point of In-
terest.

Who ought
to have right
of Votes.

Wages paid
to Parliament-
men.

Who are re-
presented.

It is no new Thing, but agreeable with Reason and Rule of Law, for a Franchise to be of an Inheritance in a Body Politick; and the Enjoyment and Benefit of it to enure to the Town in their private and natural Capacity; and this is a Case of constant Experience: Vide 1 Saund. 343. Prescription in the Burgeses of Darby for Common for their Cattle levant and couchant; so if it be a Burges, he has a distinct Property and Right as such; if a Freeman, he votes in his natural Capacity, and his Person, Estate and Liberty, are bound by it, therefore he has a Right in it.

A Franchise may be of an Inheritance in a Body Politick.

I wonder to hear it said, That it is so small a Right, as an Injury offered to it should be unpunishable, by the Rule of *De minimis non curat Lex*. Is this a little Thing to have the Privilege of giving my Vote in the Election of a Person, in whose Power my Life, Estate and Liberty lie, obstructed? Vide the Stat. of 33 & 34 H. 8. and 25 Car. 2. cap. 5. concerning Chester the one, and the other concerning Durham; and note the Words [Privileges] and [Liberties] in them: Now it is plain, that the Want of this Privilege does occasion Damages, and the having it does prevent it; so it is a great Privilege to vote for a Parliament-man, and sure every one that has that great Privilege has a Right in it; and if so, of necessary Consequence he has an Action to vindicate and maintain that Right.

'Tis no small Right to have the Privilege of giving a Vote, and therefore Action lies to maintain it.

2. It is a vain Thing to imagine, there should be Right without a Remedy; Want of Right, and Want of Remedy, are Termini convertibiles: Vid. 6 Co. Brediman's Case, 58. A Man buys the Inheritance of an Advowson, and upon the next Avoidance there is an Usurpation; and no Quare Impedit within six Months; he has lost his Right, because he has lost his Remedy: For suppose upon the next Avoidance he should present by Usurpation, and die seised, his Heir could not be remitted; so it is without Precedent to have Right without Remedy: One indeed may have both Right and Remedy, and lose his Remedy, and by Consequence his Right.

'Tis without Precedent to have Right without Remedy.

Would it not look strange to any Man that has heard of our Constitution, that the Commons of England should have a Share in the Legislature by Members eligible by themselves; and that it should lie in the Power of a Sheriff, or other Officer, to deprive any of them of so transcendent a Right, and he to be without Remedy by the Law of England?

It would otherwise look strange.

Taking it then that the Plaintiff has a Right, it is most apparent on the Record, that this Officer did exclude him from the Enjoyment thereof, and that in so doing he did well or ill: None will say he has done well, then he has done the Plaintiff Wrong in so barring him of his Right; and it is not at all material whether the Candidate, that he would have voted for, were chosen or likely to be, for the Plaintiff had a Right to vote, and being hindered of that, he has Wrong done him, for which he ought to have Remedy. If an Act of Parliament be made for the Benefit of any Person, and he is hindered by another of that Benefit, of necessary Consequence of Law he shall have an Action, 12 Rep. 100. 2 Inst. 118. and the Current of all the Books

The Plaintiff having Wrong done him, ought to have Remedy.

2 Inst. 39.
3 Cro. 133,
134. that it
must be *tam*
pro Domino
Rege quam
pro seipso.

1 Vent 34.
49.
Hob. 43.
1 Cro. 142.
1 Jo. 194.
1 Cro. 535.

are so; how comes an Action of Scandalum Magnatum? The Statute gives none, it was made for publick Peace; but being for the Benefit of great Men, of Consequence an Action lay for them, and that is the Reason why a Writ of Error lies not in the Exchequer-Chamber of Action of Scandal' Magnatum, because it is not any of the Causes mentioned, but an Action founded upon the Statute. Now if this be so, in case of an Act of Parliament, why shall not Common Law be so too? For sure the Common Law is as forcible as any Act of Parliament: And the Common Law is, That a Freeholder shall vote in choosing Knights, &c. And if you have a Right by Law so to do, shall not that Law give him an Action against him that bars him of that Right? And by the Statute of W. 1. cap. 21. all Elections ought to be free; the Words are general, [all Elections:] Now then when this Act, which indeed is but an Inforcement of the Common Law, takes this Matter to be of so great Consequence as to declare it, and give a new Authority and Sanction to it; sure it is a very bold Stroke to say, that when a Man is hindered in his Election, he had no Remedy; and it cannot be less than a Violation, and an Opposition to that Statute, to say, that he has no Remedy, after that the Statute has so manifestly interposed in it.

Injury imports Damage for Disturbance of Right, &c.
Vide Hob. 43.
Vide Dyer 26.

So for Words.

So for Indignity offered, &c.

So for Infringing a Franchise.

3. That this is his Remedy: By Brother Gould says, and all my Brothers agree with him, That he has no Hurt done him; but I did think it impossible there should be an Injury without Damage: Injury in its Nature imports Damage, though it cost not the Party injured a Farthing; for Damages does not consist in Things pecuniary, but in Disturbance of his Right: If Words be spoken of a Man, whose Reputation is so very intire that no Body believes the Words, so that he loses nothing by them; yet because it is an Injury to a Man to be ill spoken of, he shall recover Damages. Suppose one gives another a Cuff on the Ear, but does not hurt him, yet for the Indignity offered his Person, Action lies: So if another rides in a Path-way in my Land, I shall have an Action, because it is an Invasion of my Property, and Injury to my Right; here the Wrong being not Vi & Armis, so as to maintain Trespass generally, and the Law in that Case gives this Remedy: If a Man has Return and Execution of Writs, and another enters, and executes a Writ within his Franchise, he shall have Action upon his Case for the Invasion upon the Right; a pari here, for the Party had Right; and the Defendant disturbed him in the Enjoyment of it.

Hob. 43.
Where Multiplicity of Injuries causes Multiplication of Actions.

Where only Punishment by Indictment.

Objection. But here will be a Multiplication of Actions.

Resp. So there ought; for if one will multiply Injuries, it is fit the Actions for the same should be multiplied: As if in this Case the Defendant had taken upon himself to refuse 40 Votes, why should he not be liable to as many Actions? For if he had beat 40 Men, every of them would have an Action against him, for every Man's Damage is distinct from the others. If many Men are injured by one particular Act, there the Wrong-doer shall be punished by way of Indictment, because Actions shall not be multiplied; but if there be but one Man offended

fended by that particular Act, or a more special Manner than others, he shall have his Action; and if he injure a third Person by another particular Act, he shall have his Action, & sic in infinitum. If there be a Common, and one hundred Commoners thereof, and one Person digs a Pit there; for that one Pit every one of the hundred shall have his Action, because of their several Rights; but if a Pit were dug in a Highway, then it were a common publick Nuisance, and that is the true Reason of William's Case: And of the Case of Turner v. Sterling, there he was not elected; for it could not appear who had the Majority, he or his Competitor; there he could not give his Loss of Place in Evidence for Damage, because he was not elected: But the Cause of Complaint was, That it being difficult on the View to guess who has chose, he had a Right to demand a Poll, and the Denial of that was an Injury to his Right, for which Action was held maintainable. And he quoted Bowman's Case, 2 Roll. A Man makes a Lease, the Law gives him Leave when he thinks fit to come and see if there be Waste; he comes to see, and Lessee hinders him: It did not appear what the Damage was, or that any Waste was committed; yet he shall have his Action, because he had a Right in the Enjoyment whereof he was disturbed.

Action for digging a Pit in a Common.

Alii, If in the Highway.

2 Lev. 50.

Post 100,

ante 48.

1 Vent. 206.

2 Vent. 25.

3 Keb. 26,

32.

Action for denying a Poll.

For hindring Lessor to see if any Waste be.

My Brothers say, Oh! alas, here is a Remedy in Parliament; we must be very tender, for the Matter is nice, and the Parliament may judge this a different Way.

Answer. As this Case is, they cannot go to Parliament; for it is agreed, That those against whom he would have voted were elected, and his Grievance here is, that he is not represented; for if a Man be not allowed his Vote, he is not represented; if he be allowed his Vote, and the Majority is against him, his Vote is included in the Majority; and the Encouraging of Remedies for Injuries is the most effectual Way to make these Officers honest and observant of the Constitutions of their Cities and Boroughs, and they would decline such Practices as we daily see them guilty of.

As the Case is, they cannot go to Parliament for Remedy.

Objection. But it relates to Parliament: What then? It is a Matter that wholly depends on Charter or Prescription, and they sure are Things of which the Queen's Courts have Conscience; and to judge of them, is not to enlarge their Jurisdiction; and if this be Matter within our Jurisdiction, we are upon our Oaths bound to maintain it, more especially when they cannot go to Parliament: And if a Freeman of a Borough had applied to the House of Commons, for that he was denied his Vote, they would have sent him to take his Course at Law.

What if it relates to Parliament.

As to the Authority of my Lord Hobart 318. it is true, my Lord Hobart is of that Opinion, and it is a very fine one; but how it would hold on Debate, may be doubtful: There was indeed no Damage in a Quare Impedit at Common Law, but the Statute gives it against the Disturber; and if the Plaintiff in a Quare Impedit does not make the Bishop a Disturber, he is barr'd of the Benefit

Quare Impedit.

No Recourse
to Parliament.

As to the
Object. That
such an Ac-
tion was ne-
ver brought
before.

Disparage-
ment of
Ward.

Vide ante 48.
1 Vent. 206.
2 Vent. 25.
The Law con-
sists not in
particular In-
stances, but
in the Reason
that rules
them.

The Election
comes not in
Debate.

1 Mod. 85.
2 Lev. 69.
2 Keb. 866.
3 Keb. 72,
112, 135.
3 Keb. 578.

Err' brought
and Judgment
reversed by
the Lords.

Benefit of the Statute: But let that be how it will, it is not like this; because as this Case is, they can have no Recourse to Parliament to ascertain the Right.

As to the Saying of Littleton, That such an Action was never brought, therefore it lies not: It is true, Non-user is a good Argument where it is supported with Reason, otherwise not; this Saying was upon the Statute of Merton, cap. 7. The Statute says, That if Lord by Knight-Service married the Heir under Fourteen, where he was disparaged, si Parentes conquerantur, the Question was, What was meant by Conquerantur, whether it must be a Complaint in a judicial Manner? And it was agreed, that Conquerantur was the same as if he had Cause of Complaint; and that as a more severe Construction against the Lord, that if he should be so unjust as to disparage his Ward, that he should lose him, and that in Consequence must have been by Entry upon the Lord; and if they were disturbed, they should have an Ejection of Ward, because the Law gave them the Custody: So in that Case the Argument is grounded on Reason, from the very Words of the Statute, and the constant Construction thereupon: And to carry it generally farther, and to extend it to all new Cases, would destroy many late Authorities, as the Case of Hunt and Bowman, 16 Jac. for hindring Lessor to see if Waste were committed, which was the first of the kind, as was also the Case of Turner and Sterling.

Let us consider wherein the Law consists; not in particular Instances, but in the Reason that rules them: Ubi eadem Ratio, ibi idem Jus: And if where one is injured in one Sort of Right he has a good Action, why shall he not have it in another? Or how does this differ from other Cases? For though the House of Commons have Right to determine Elections, yet they cannot judge of the Charter originally, but secondarily, or as incident to the Determination of the Election; and therefore where an Election does not come in Debate, as it does not in this Case, they have nothing to do: And we are to exert and vindicate the Queen's Jurisdiction, and not to be frightened because it may come in question in Parliament; and I know nothing to hinder us from judging of Matters depending on Charter or Prescription: Morfe and Slew's Case, 23 Car. 2. 1 Vent. 190, 238. was the first of the kind; Jo. 93. Palmer 350. Action for malicious indicting for Treason: And he quoted a Case of Bodily and Lawne, 15 Car. 2. in the Lord Bridgman's Time; for there Action was held maintainable for a Man against some that had made a Riding for him and his Wife, the Wife it seems being used to henpeck her Husband; and he concluded for the Plaintiff.

Note; A Writ of Error was brought of this Judgment before the Lords, and the Judgment reversed. 1 Salk. 21.

Sutton, *Marshal of the Court.*

Post 91. S. C.
Vide 1 Sal. 2.
Ld. Raym.
1005. S. C.

HE having not attended for two Terms, and a new Marshal being presented to Court to be sworn in, he produced a Lease from the Patentees of the Office, for a certain Number of Years, determinable on his Death: And held per Cur', That albeit a Lease for Years absolutely of this Office was void, yet a Lease of it for Years determinable upon Life of Lessee is good; for the Danger of the Office's going to Executors or Administrators is avoided, and that is the sole Reason why the Office is not absolutely grantable for Years.

That a Lease of this Office for Years determinable on Lessee's Death, is good.
Vid. tamen Hob. 153.
Ld. Raym. 159, 163, 164, 853, 1038, 1245.

Note; Here the Court said, They would swear this Man in, without meddling with the Possession, but leave that to the Determination of the Law in the ordinary Course: And he took his Oath upon his knees.

New Marshal sworn upon his knees.

Queen *versus* George.

Ante 40. S. C.

IT was agreed, That the Clause in the Statute of 4 & 5 W. & M. against destroying the Game, (That if any Hare, Rabbit, &c. be found upon a Person not qualified, he shall be convicted) it was agreed, I say, That [be found upon] shall be understood [Proof made] that it was found upon him, otherwise there could be no Conviction.

Game found upon a Man, &c. supposes Proof made.
Caf. temp. Mac. 26, 27.
Comyns 274, 522, 576.
Ld. Raym.

1415, 1220, 1387, 1368, 1478, 1546. Stra. 496, 711, 1098, 1126.

Memorandum; It was said by Serjeant Powys in Chancery, That if a Bishop make a Lease for 21 Years, and Lessee creates a Trust thereupon, and after the Bishop dies, and his Successor, suppose for a Fine, renews the Lease, though not compellable to do it; and tho' there be no Trust of the second Lease, yet Equity shall subject it to the former Trust.

Bishop's Lease renewed, subjected to a former Trust.
Abr. Eq. 272, 273, 326.
Gilb. Eq. Rep. 77.
Wms. 101.

Preced. Chan. 319. 3

Lesauld *versus* Dyer.

2 Salk. 457.
650. S. C.
Antea 18.

Note. **P**ER Cur', & omnes Clericos; The Meaning of the Rule, that after a Cause has slept four Terms, after Issue joined, there must be a Term's Notice of Trial, is, that there should be some actual Proceeding within the four Terms; for a Proceeding actually out of the four Terms, though by Acceptation of Law it may be within the four Terms, is not enough: As if Ven' fac' be taken out in the Vacation after the fourth Term, tested, as it must be, in Term, so that in Consideration of Law it is of that Term; yet because in Fact it was after, it is no such Proceeding as to bring the Party out of the Necessity of giving a Term's Notice.

Concerning a Term's Notice of Trial after a Cause has slept four Terms.

What shall
be said suffi-
cient Proceed-
ing in the
Cause.
Notice.

Term of
which Issue
is join'd, is
excluded.

Ven' fac' in
Vacation.

And here Gould, Just. cited the Case of Cow and Hare, Pasch. 10 W. 3. that if the Causes had any Agitation within the four Terms, as striking a Jury, or any Motion in the Case, it would be sufficient Proceeding: And per omnes Clericos, Notice any time, sedente Cur', within the last Day of the last of four Terms, is sufficient, for that shews the Matter has not slept four whole Terms, and the Term of which the Issue is joined is to be taken exclusively; for the Rule is, that Proceeding be within four Terms after Issue joined: So that if Issue be joined in Trinity Term, and any Proceeding or Notice before the End of next Trinity Term, it will be enough. And here it appears by the Indorsement on the Back of the Ven' fac', that it was taken out in Vacation; and for want of Compliance with the Rule, the Verdict was set aside.

Ld. Raym.
968. S. C.

Queen *versus* Hoskin.

Servant to
J. S. a good
Addition.
Vide 2 H. 6.
31. & 9 E. 4.
48. acc. So
2 H. 4. 7.
21 E. 4. 71.
Bro. Additi-
ons, 56, 58,
&c. Ld. Raym. 264, 849, 859, 1179, 1541. 1 Mod. Cas. in L. & Eq. 51, 52. Stra. 556, 816.

Servant was indicted for a Trespass committed by him by the Command of his Master, by the Name of A. B. Servant to J. S. and Exception was taken that there was no Addition, Servant being not good: But per Holt, Servant to J. S. is a good Addition, and as certain as [Gentleman;] and he said, There could be no other Exception to the Caption the same Term it comes in; and no more was done. See of Apprentices post 69.

Ld. Raym.
967. S. C.

Claxton *versus* Bafty.

Statute of
Composition
of Two
Thirds
pleaded in
Bar.
Vide post
156.
Ld. Raym.
324, 382,
390, 763,
1536.

THE Statute of Composition of two Thirds was pleaded in Bar, and averr'd, that the Defendant had absconded at such a Time before the Statute; but not said, that he had absconded, or was in Jail at the Time mentioned in the Statute: And the Exception taken was, that for ought appeared in this Plea, the Defendant was solvent at the Time of the Statute, and therefore not capable of the Benefit thereof. But per Cur', This being a Bar, shall be good to a common Intent; and if the Defendant became solvent after the Failure, it ought to come of the Plaintiff's Side by Replication.

If the Wri-
ting was to
be produced
with a Pro-
fert.

2. Exception. That the Defendant pleaded the Composition as a Writing under Hand and Seal, Ideo a Deed, and by Consequence to be produced with a Profert: But per Cur', he only pleads it sign'd and sealed, but not to have been delivered as a Deed must have been; and the Statute does not require Delivery, Ideo no Necessity of a Profert.

Judic' pro
Def' Nisi,
&c.

3. It is pleaded to have been made the 12th of February after the Statute, so it may have included Debts becoming due after the Statute. But per Cur', It shall only be a Composition for the Debts understood by the Statute, at least as to the Non-subscribers, though it may be otherwise to Subscribers. And Jud. Nisi pro Def'.

*Lord Mohun's Case.*Vide 3 Chan.
Rep. 102.

Charles Gerrard, Son to the Lord Brandon Gerrard, was attainted of High Treason in the Second Year of King James 2. for Treason committed against King Charles 2. and obtained his Pardon, and Leave to reverse his Attainder; and accordingly he brought a Writ of Error, and assigned Error, which the then Attorney General confessed, and obtained a Rule upon his own Motion for Reversal of the Attainder; but the Record of the Reversal was never made up. The Lord Brandon Gerrard dies, and Charles Gerrard succeeds him in Honour and Estate, and late many Years in the House of Lords, and before the Death of his Father, after the Reversal in the House of Commons, as a Person duly qualified, he was after by King William made Lord Macclesfield, and by his Will devised his Estate to my Lord Mohun, and made him his Executor, though he had several Daughters that were Heirs at Law. Upon this the Daughters finding that there was no Roll of the Reversal of the Attainder, suggest that Matter by Petition to the Queen, and implore her Grace. The Queen refers the Matter to the Examination of the Attorney General and Solicitor: Whereupon Mr. Solicitor in Trinity Term before, moved for a Rule for staying of all Things as they were 'till the Court were further moved, and had such a Rule: And now it was moved for my Lord Mohun, That he might make up the Record; and it appearing upon Examination that there was no Writ of Error, or Assignment of Error, that his Counsel would own or produce; the Court unanimously declared, That the first Rule was a very reasonable good Rule, and chid some of the Counsel that called it an Extraordinary one: They said, They would ever make such a Rule upon the like Occasion; and that it is frequently done between Party and Party, that if there be a Rule for a Judgment, and it is not entered for many Years, if the Court be informed of it, they will not let them enter it 'till the Matter be examined, how it came not to be entered before.

C. Lord Gerrard attainted in K. James 2d's Time of High Treason committed in K. Ch. 2d's Time. Err' brought, and Rule to reverse the Attainder, but Record never made up.

C. Gerrard his Successor devises the Estate to Lord Mohun, in Prejudice of his Heirs.

Heirs petition the Queen's Grace, there being no Roll of the Reversal. Lord Mohun moves to make up the Record,

When Court will not let a Judgment neglected (after a Rule) to be entered. Vide post 191.

2. They said, they would supply the Neglect or Defect of their Officer, that Subjects should not suffer by it, and therefore would give Leave to make up the Roll now.

3. That they could not make up a Record of a Reversal of an Attainder without a Warrant, viz. 1st, A Writ of Error: 2dly, Assignment of Error: For the Writ of Error being brought in the King's Bench, viz. the same Court where the Attainder was, no Error could be assigned there, but Error in Fact; and it may be the Errors assigned were Errors in Law, and this ought to appear to us that we may not order a wrong Record to be made up.

Said they could not make up the Record without a Warrant, as Writ of Error, &c. Vide 2 Lev. 38.

And at another Day perceiving the Court would not suffer the Roll to be made up without a Writ of Error, they produced a Writ, which was of a Judgment of Attainder for Treason committed in King James the 2d's time; whereas it should have been, as the

Truth

Lord Mohun produced a Writ of Error of a Treason committed in Time of K. James 2.

Truth was, in King Charles the 2d's time: And the Errors assigned were both in Fact, and in Law; in Fact, that two of the Jury never appeared; in Law, for that the Ven' fac' was qui tam: Whereas it was in the King's Case; and now they moved for Leave to make an Entry.

Obj. against
entring the
Judgment
upon this
Writ of Er-
ror.

Attorney General contra. It appears their Writ of Error is not to reverse this Attainder, and therefore you will not now suffer them to enter up a Judgment of Reversal, when it does appear the Writ which is the Foundation is wrong, and can't be an Authority to reverse the Attainder, for it is not Ad idem. And if Judgment be entered now, it becomes your Judgment; and therefore you ought to examine the Foundation of it, and not give Order for the Entering of a Judgment only to put the Matter in Bungle. Besides, when there is a Rule for Judgment, and that not entered for some Time, you take Care for the Safety of Purchasers to have it entered of that Time that it is really given of. And by the Act of the Civil List, this Estate is unalienably fixed in the Queen, and would by the Relation of this Entry be divested out of her.

The Question,
per Cur'.

Cur'. The whole Question will be, Whether we shall now command our Officer to do that which he ought to have done long before? And it was said, That in case of Common Recovery, after Death of Parties, the right Original not having been filed, but found in the Attorney's Study, was ordered to be entered up. And as to the Matter of Purchasers, there are in all Probability many in this Case under my Lord Macclesfield, which it were hard to defeat. And the Doubt at last came to be, Whether they would leave my Lord Mohun loose of the Rule, to do what he could according to Law, or hold him to particular Directions from the Court? For the Court said, That if he should make any Entry but what should be well warranted, the Court would punish the Clerk that should do it, and also set it aside. And at last it was ruled, That they should make a Draught in Paper of the Record that they would make up, and attend the Judges and Mr. Attorney with it. And the Writ of Error, such as it was, was entered on the Roll (with a Valeat quantum valere potest, per Cur') but the Court would not make a Rule in it to make it their Judgment, but only that their Officer should make that Entry now, which he should have made when the Rule was pronounced.

A Doubt.

Burridge *versus* Fortescue.

Of staying
Proceedings
upon Pay-
ment of Prin-
cipal, &c.

IN Debt upon a Judgment, the Court will not stay Proceedings on Motion upon Payment of Principal, Interest and Costs, as they will upon Debt on Bond; and in that Case it is an equitable Motion to be relieved against the Penalty, and therefore whatever Costs the Plaintiff has been in any wise put to, shall be allowed him. Per Cur'. Vide antea 25. Faresl. 114, 140, post 153.

Evans

Evans *versus* Roberts.

A Writ of Error of a Judgment upon a Bond, before the Sheriff and Bailiff of Bristol in Cur. held before them, secundum Legem Mercatoriam, secundum Consuetudinem Civit. præd. tempore cuius, &c. Eyre excepted, 1. That there is no Curia held per Legem Mercatoriam before the Sheriff, for that must be only held before the Mayor of the Staple, and in Matters only concerning Staple Transactions. But, per Cur, It being laid to be secundum Consuetudinem Civitatis, it will be well enough, like the Case in 1 Cro. 46. where a Court of Pypowders, which only is intended of Courts for Fairs and Markets, during the Fair or Market, and for Matters there arising, is said to be held at Gloucester, secundum Consuetudinem Civit. præd, and Action for 100 l. therein; and held good, because of Consuetud, &c. Vid. Saund. 87, 311. for it being laid to be an ancient Court, it shall be intended a common inferior Court, for common Matters conusable there. 2. Exception was to the Writ, for it was to remove Recordum Loquelæ quæ coram vobis residet, and it appears that the Record removed was before his Predecessor. And Court said, That the Writ being directed to the Sheriff, without naming him, it is well enough; and if a Writ be directed to the Sheriff of B. and before its Return another Sheriff is chose, he ought to return and execute the Writ, and the Difference is when it is directed to him by Name, and when by the Name of his Office generally; and this is not like a Writ of Error from Common Pleas, for that is always to the Chief Justice by his Name, if there be a Chief Justice, or to the others by Name, and therefore must not vary.

Error of Judgment in Cur. Bristol upon a Judgment upon a Bond Sec'm Leg. Mercat. & Conf. Civit. Ld. Raym. 1543. Cas. temp. W. 3. 598. Cas. temp. An. 7. 275. Sec'm Conf. Civit' is well enough.

1 Sid. 64. 1 Keb. 165. 187.

Note; Here the Answer to the Writ of Error was, That there came another Writ of Error to them before that Writ, bearing the same Teste and Return, and recited the Writ, and made a Return to it; and held good, and Judgment affirm'd.

Judgment affirm'd, another Writ of Error having been before, and return'd.

Domina Regina *versus* Dixon.

HE was indicted for selling five Pards of Mustin, and affirming it to be worth 4 s. a Pard, when in Fact it was really worth but 2 s. 6 d. a Pard, and a Certiorari brought to remove it, but not served till after Conviction; and tho' the Court had no Opinion of the Indictment, yet they said they did not like Certiorari's after Verdict, and that whenever one removes an Indictment on which there is a Conviction, the Certiorari ought to give Day above, which was not done here, therefore it was altogether irregular, and that by this Certiorari they could by no Means remove the Indictment; for if one takes out a Certiorari to remove an Indictment, and will not use it till after Conviction, or the Jury sworn, he loses the Benefit of it:

1 Salk. 150. S. C. Ld. Raym. 971. S. C. False Affirmation of Value upon Sale. For cheating, &c. Vide ante 42, Post 105, 311. 1 Salk. 379. Ld. Raym. 1118.

R

And

Vide ante 17,
33, 40, 43.
Post 83.

And for that the Writ was quash'd, and a new one granted to remove the Indiamment, and Conviction thereupon, and ordered them to make it special, and give the Prosecutor Day thereupon above. Vide ante 17.

Mills *versus* Wilkins.

Intrat' Hill. 13 W. 3. & ad Mich. 2 An'.

Trespas for
taking Skins.

IN Trespas for taking several Skins from the Plaintiff, the Defendant justified as an Officer by Vertue of the Statute of 1 Jac. 1. c. 22. for well Tanning of Leather, setting forth the Title thereof variant from the Record, and averred, That the Skins were not dressed according to the Intent and Meaning of the Statute, without shewing any particular Defect. And two Exceptions were taken to the Plea:

3 Keb. 641,
642, 648.
Dyer 324.

1. That there is no such Act intituled as they set forth, and tho' it was unnecessary for them to set forth the Title of the Act, or to recite it particularly, yet since they have taken upon themselves to do it, they must do it truly at their Peril; for by their particular Description of the Act, they tie up their Justification to the Statute they describe. Cro. Car. 232. 3 Keb. 648.

2. That they did not shew wherein the Defect was, that the Court might judge whether it were contrary to the Act or not.

If Variance
in the Title
of Act of
Parl' avails.

3 Cro. 186.
Staund. 128.

To the first Exception it was offered for Answer, That the Title is no Part of the Act, and that an Act may be without any Title at all, as most of the ancient Acts are, and therefore a Variance in the Title is nothing; and for this was quoted the Saying of my Lord Hale in Hard. 324. and an Opinion of the whole Court in Common Pleas in the Case of Chance *versus* Adams, Hill. 7 W. 3. Rot. 868. grounded upon that of Hale. Hutton 56. Hob. 310. 11 Co. 33. 4 Inst. 345.

And to the 2d it was answered, That the Seizure was not as an absolute Forfeiture, but to try the Sufficiency, and it would be hard to put an Officer at his Peril in such a Case to know and to set forth the Defect.

The Title is
no Part, and
need not be
set out spe-
cially.
V. Ld. Raym.
77, 120,
343, 382.
2 Vern. 58.
1 Wms. 317.
3 Wms. 434.
How to be
set out.

Holt, Ch. J. It is true, the Title of an Act of Parliament is no Part of the Law or enacting Part, no more than the Title of a Book is Part of the Book; for the Title is not the Law, but the Name or Description given to it by the Makers: Just as the Preamble of a Statute is no Part thereof, but contains generally the Motives or Inducements thereof, and therefore not necessary to set forth the Title or Preamble, but generally that at a Parliament-Sessions held such a Time, &c. enactit' fuit; tho' some have been so over-cautious, as not only to set forth the Title of the Act, but also to

to do it in English; but sure that is too much Caution, and the true Way to set it out, if at all, is in Latin; and by setting out the Title specially, you tie your Justification to an Act so intitled, and if you cannot produce one, you are gone: And he said, the Saying of Hale was sudden, [if at all,] and notwithstanding his great Veneration for his Opinion, he could not agree with him. And Gould agreed with the Chief Justice, tacente Powell, only declaring, that he had concurr'd with the rest in the Common Pleas, solely upon the Opinion of Hale reported in Hard. And upon this Exception the Plaintiff had Judgment.

3 Keb. 641,
642, 648.
Dyer. 324.

Vide postea.

Judic' pro
Quer'.

Cotton versus Martin.

DEBT upon a Bond to come to an Account. The Plaintiff had been Prisoner in the Fleet, and having escaped, was taken up by a Warrant according to the late Act of Parliament, and committed to Newgate. And an Affidavit being made that nothing was due, and the Plaintiff by his being in Newgate being disabled from coming before a Judge to shew Cause of Action, and that Disability coming from his own Wrong, viz. the Escape, the Court ordered common Bail; if he had not been escaped, he might have got out by a Day-Rule.

Debt upon
Bond, &c.

Escape.
Vid. ante 21,
22, 37.
Post 95, 125,
154, 183,
225, 253,
and 78.

Smartle versus Penhallow.

Intrat' Trin. 2, & Mich. 2 An. B. R.

1 Salk. 188.
S. C.
Ld. Raym.
994, &c.
S. C.

UPON a special Verdict, the Case was this: The Custom of the Manor of Tregueir in Cornwall was found to be, That every customary Copyhold of that Manor might be granted to three Persons, Habendum to them successively, sicut nominantur, & non aliter; and that on the Death of every Tenant, the Lord should have his best Beast for a Periot: And a Surrender is found to have been to T. N. and his Assigns, for his own Life, and the Lives of two others; and the Question was, If this Surrender were warranted by the Custom?

Special Ver-
dict of a Cu-
stom to grant
a Copyhold to
three Persons,
habend' &c.
Vide 1 Mod.
102.
Ld. Raym.
132.
Caf. temp.
An. 57, 58.
1 Wms. 781.

1. For the whole; that is, for three Lives.
2. In case it be not good for three Lives, Whether it be good for his own Life?

In the Argument of this Case it was agreed, That a Lessee for Years of a Manor might grant a Copyhold Estate in Fee, and so for Life or Lives, and the Grant shall be good against him that has the Inheritance. But it was urged, that if by making a less Grant than the Custom warrants, the Tenure should be altered, or any Damnification of the Service occasioned, such Grant of lesser

Where a
Lessee may
grant above
his Estate,
but no less.

6 Co. 37.
Vaugh. 187
to 205.
2 Bull. 11,
12, 13.
Cro. El. 58,
721.
Vide post 68.
Carth. 427.

lesser Estate than Custom warrants would be void, and a Prejudice would ensue to the Lord by this Grant; for now it would be an Estate for autre Vie of which there might be an Occupant, and then the Lord would have a Tenant whom he knows nothing of, and Occupancy may be of a Copyhold, as well as Possessio Fratris. It is true, a Copyhold Estate shall not have all the Qualities of an Estate at Common, as Tenancy by the Curtesy, and Dowry, but these are excrescent Interests; and tho' 1 Roll. Ab. 511. Ven and Howell's Case, be against this, yet it seems that the Reason of the Prejudice which would ensue to the Lord is sufficient to overthrow that, and if it cannot be good in all, it is more consonant to Law to make it void for the whole, than to let it stand in Part, and avoid it for the rest; for the Custom is in the Nature of a Power, which must be strictly pursued; as if a Tenant for Life by a Settlement has Power to make Leases for 21 Years, and he makes a Lease for 30, it is void even for 21 Years; so if there can be Occupants, it cannot be good because of the Prejudice to the Lord; if there cannot be Occupancy, it cannot be made good to his Assigns, because not pursuant to the Custom, and then it cannot be good for the first Life, because less than the Custom (which is in Nature of an Authority) warrants.

Averment of
Term or
Life.

Again, suppose it might be good for Life of T. N. yet the Jury not having found him alive, it shall not be intended; as if Tenant for Years, or for autre Vie, bring an Ejectment, he must aver the Term, or the Life of Cestui que Vie, to continue; and so here the Jury ought to have found it, especially when they have not concluded upon a special Point, in which Case the Court shall only consider what the Jury have made a Doubt of, and all other Things shall be intended, according to 2 Cro. 622, and 6 Co. Goodale's Case.

Heriot-Ser-
vice.
2 Saund. 166,
167.

Besides, if this were construed a good Grant within the Custom, the Lord should lose his Heriot; for the Payment of that Service is confined to such Grant as is precisely warranted by the Custom, viz. a Grant to three for Lives sicut nominantur; and this is no such Grant, therefore no Heriot; ideo it would be a Prejudice to the Lord, and by Consequence the Grant not good; and it will not be an Answer to say that Heriot-Service is an accidental Service, 2 Cro. 76. and the Dean of Worcester's Case in 6 Co. for the Statute upon which those Cases go, that orders the usual Rents to be reserved, takes no Notice of Heriot, because it is an accidental Service; but here the Custom specially mentions a Heriot to be Part of that Service, and therefore it ought to receive the same Construction that those Cases would, in Case the Statute had mentioned Heriot.

2d Argument
That this
Surrender,
Etc. was not
according to
the Custom.
Ante 19, 20.

At another Day, in Michaelmas Term, for it was spoke to first in Trinity Term, Serjeant Hooper argued of the same Side, and urged, That this could not be a Grant within the Custom, for that is of a Grant to three, Habendum sicut nominantur successive; and the Grant here is only to T. N. for the Life of two more and himself; so it is no Grant at all to the two Cestui que Vie's, nor is T. N. the first Life mentioned.

And as the Objection of Qui potest plus potest minus, if a Man may grant in Fee by Custom he may grant for three Lives, it is true with some Distinctions; if a Man has Power to grant in Fee, reserving Rent, he cannot grant for Life without Reservation.

2. The Estate granted must not only be less in Judgment of Law, but also in Value; for if a Man has Power to let for three Lives, and he lets for 100 Years, that indeed is less in Judgment of Law, but because not less in Value, the Grant is void. All Authorities, whether created by Act of Parliament, or the Party, as in Settlements, or by Custom, as here, are still but Authorities, and therefore not to be varied from; and he quoted Whitlock's Case, and the Difference there, and puts Cases upon the Statute that enables Bishops to make Leases: If a Bishop who by the Act may make a Lease for 21 Years, make it for 22, it is void for all; and if a Man makes a Lease parol for four Years, it shall not be good for three, upon the Statute of Frauds and Perjuries: But he insisted chiefly upon an Inconveniency that would ensue in this Case; for if T. N. were a Trader, and committed Bankruptcy, this Estate for three Lives would be granted to an Assignee, and then it would be quite out of the Custom; for then Assignee would hold it after Death of T. N. during the other two Lives, and the Lord should lose his Heriot.

Williams contra. 1. We are upon the Construction of a Grant to an honest Purchaser, for a valuable Consideration.

2. This will be good, if not to him for his and two other Lives, at least for his own Life, and that will do as well for us: The Substance of the Custom is to make a Grant for three Lives, that is, the Quantity of the Estate; but whether it be to one Person for three Lives, or to three for their Lives, is only accidental, and a Quality; and the Quantity or Continuance of the Estate, is what is only material; and the Meaning and Drift of the Custom is to hinder any longer Incumbance upon the Land than for three Lives, but not whether the Lives named or others, are to enjoy it; and since by the Custom it may be to three for their Lives, a fortiori it may be to three for the Lives of three others, so that is a less Estate; and that which we contend for is less than that again; and if the first Grant had been strictly pursuant to the Letter of the Custom, as found, sure it cannot be denied but the several Grantees might grant each his own Estate, and the Lord would be compelled to admit each Surrenderer; or might they all grant their Estates to one Person, who then would have the same Estate as we now contend for? And if so, why may it not be at the first? For it would be against all Reason, that the Grantees that claim under the Lord should do it, and not the Lord himself: And he relied upon the Case in 1 Roll. Abr. 511. as full in Point; for the Reason given there rules this, viz. That it can be no Inconveniency, but rather a Conveniency to the Lord; for since there can be no Occupancy of a Copyhold Estate, it would be more advantageous to the Lord to have such a Grant as this, than to have it to the three Persons named for their Lives; for upon the Death of the Tenant that takes for his own Life and

Bishops Leases,
Gr.

Loss of He-
riot.

As to the
Quantity and
Quality of the
Estate.

If such Grant
a Conveniency
or Inconveni-
ency to the
Lord, and if
Occupancy
may be.

two more, the Estate would come to him again; whereas in the other Case, it would go to the next in Remainder; and there is a known Diversity between the Lord pursuing a Custom, and one acting by a bare Authority; the one has Authority and Interest, and therefore may do less, the other has a bare Authority without any Interest, and for that Reason cannot vary from it. 1 Inst. 52.

If it may be good for the Life of T. N.

Void Clause.

Intire Sentence.

Deed void by the Habendum.

If an Occupant of a Copyhold Estate.

Q Vide 6 Co. 37, &c. contr' 1 Sid. 136, 137.

Adjudged in C. B. that the Statute extends to Things that lie in Grant, and of them there could be no Occupancy.

Ergo Quære de hoc? A bare Power exceed. Ld. Raym. 726.

1 Vern. 234.

2 Vern. 265.

Caf. temp. W.

3. 123.

1 Mod. Caf.

in L. & Eq.

352.

Per Cur', Lord that may grant for 3 Lives, may grant for one.

But suppose this Point were against me, at least it will be good to T. N. for his own Life, for that is less than for his own and two Lives more. 4 Co. 29. If by Custom the Lord may grant for Life, he may grant durante Viduitate, tho' such a Grant were never made before; yet because at most it can go no farther than Custom warrants, and that possibly it may determine sooner, it is good, so far of the Grant as to go to him for Life is good; and if the Words, and for the Lives of A. and B. be repugnant or void, let them be rejected, for a void Clause will be the same as if it were not in at all. Hob. 171. makes a Difference where Tenant for Years grants all his Estate, Habend' after his Death, the Grant is good, and Habend' void; but where all is one entire Sentence, as if he had granted his Estate after his Death, there the Grant were all void: And some Books made the Difference where an implied Estate is granted in the Premises, for that may be avoided by an Habend'; but otherwise of express Estate, as if Feoffment be to A. Habend' to him and his Heirs after Death of B. the whole is void by the Habend'; and it may be Reason that where an Habendum may encrease an Estate, that it may likewise avoid it, if it be against Law; but here the Habendum cannot encrease it, for if it cannot make it but for Life, Ideo not destroy it.

There can be no Occupant of a Copyhold Estate for two Reasons:

The first, Because there cannot be a Tenant of Copyhold, but by Surrender and Admittance.

Secondly, The Statute concerning special Occupants, does not extend to it, because there were no Occupants could be before, and that the making it now would turn to the Prejudice of the Lord, and general Words of an Act shall not be extended to Copyhold Estate if it may prejudice the Lord.

As to the Objection, That the Clerk does not find the Life of T. N. to continue: I answer, That shall be supposed to continue till the contrary appear; and he quoted some Cases where one having a bare Power exceeding that Power, it shall be good for what is within the Power, and void for the rest, 1 Inst. 52, 258. Perk. 189. Letter of Attorney to deliver Seisin to A. and he delivers it to A. and B. and good to A. and void to B. tho' the making of Livery is as entire an Act as the limiting an Estate can be.

Holt Ch. J. and Cur', If the Custom be to grant a Copyhold Estate for three Lives, the Lord in Fee of the Manor cannot exceed that, and a Lord at Will of it may go so far, for it is not material what Estate the Lord has in the Manor; and sure he that may grant for three Lives, may grant for one Life, as if Custom be, that he may grant a Copyhold in Fee solummodo, yet he may grant in Tail, for Life,

or

or Years, and here the three Lives is only the Extent of the Custom, but not to bind a Man to the Formality of an Estate for three Lives. The Custom in this Case consists of three Parts:

1. The Constitution or Creation of the Estate, viz. that it be by Copy. How this Custom consists.
2. The Extent of it, that it shall not exceed three Lives.
3. The Manner of granting it, that if it be to three, that they shall not take jointly and in præsentî, according to the Course of the Common Law; but that the first named shall take all for his Life, and the second all for his Life, and so of the third.

If the Custom then enables him to let for three Lives, it will enable him to do it for one; as if the Custom were to grant in Fee, he might lease for Life, Remainder for Life or in Tail, Remainder in Fee, for the Custom is not to grant one entire Estate in Fee; if the Custom be to grant for Life, he may grant durante Viduitate, tho' that be another Limitation than for Life: And generally where the Custom is to grant to three for their Lives Habend' successive sicut nominantur, there likewise the Custom is, that the Tenant in Possession may by the Surrender of his Estate defeat the Remainders. And the Chief Justice put a late Case in this Court, where upon a special Verdict this Custom was found, and the first of the three purchased the Manor; and the Question was, Whether inasmuch as he had a Power to frustrate the two Remainders by Surrender, he by his Purchase of the Manor had extinguished them? And there it was held to be no Merger or Extinguishment of the Estate, because the Custom of destroying the Remainders is confined to the Formality of the Surrender, and the Purchase of the Manor, though it be between the Parties a Surrender, yet it shall not be construed as such to other Purposes, viz. to destroy the Remainders; and if the Grant had been only to T. N. in this Case for his own Life, that had been good; and if he had granted it to another Grantee, he would be Tenant pour autre Vie; and why may not that be by the first Grant as well as by mean Grants? I cannot tell; for this is no Estate capable of Occupancy; and if the first of the three commit a Forfeiture, he in Remainder should not enter, but the Lord should enter, and hold it during the Life of such first Tenant. And as to the Objection, That the Heriot would be lost, that is not so; for the Lord would have a Heriot upon the Death of every Tenant, and upon the Death of T. N. here, and he is the only Tenant; and tho' he has none on the Deaths of the Cestuy que Vies, it is because they are not Tenants. And as to the Objection, That the Jury does not find the Life of T. N. it would be necessary to aver it in Pleading, but not in a Verdict; and we shall not intend him dead, especially when the Plaintiff makes Title against him, and therefore ought to alledge his Death if the Truth be so.

Vid. 4 Co. 23.

a. 30. a.

Godb. 20.

1 Leon. 56.

Cro. Eliz.

323, 373.

Mod. 627.

1 Roll. Abr.

511. L.

Lord may

grant for ano-

ther Limita-

tion.

Remainders

defeated by

Tenant.

If the Grant

had been only

to T. N. for

his own Life.

Heriot not

lost.

But

If T. N. had
become a
Bankrupt.
Vid. 1 Danv.
Abr. 691.

Assignee in no
better Condi-
tion than the
Principal.

Q

If Assignee
died, living the
Copyholder.

No Occupant
of a Copyhold
without a spe-
cial Custom.

No Occupancy
of a Rent-
charge.

Per Cur', The
Grant good.
Ante 64.

But suppose T. N. had become a Bankrupt, and this Estate be assigned. Resp. Suppose it were to three, sicut nominantur successive, and the Tenant in Possession became a Bankrupt, shall not the Case be the same? For Assignee shall be Tenant pour autre Vie. And the Objection will be the same, for this is a Consequence upon the Interpretation of the Act of Parliament, and shall not at all prejudice the Lord; for if the Assignee dies during the Life of a Copyholder Bankrupt, there will be a Case out of the Custom by the Transmutation of the Tenant by the Act of Parliament, and yet the Lord shall have his Heriot; for it never was the Intent of the Statute to put the Assignee in a better Condition than his Principal, whose Estate he has, would have been in, nor to work an Alteration of Tenement to the Prejudice of the Lord: This is supposing the Copyholder surviving should not have it back again; and if he shall have it again upon the Death of Assignee, during his Life, then the Lord by original Custom ought to have Heriot, and a subsequent Act of Bankruptcy shall not defeat him of it; and if the Copyholder had died, living the Assignee, and thereby his Interest determined as some thought it would; Q. Who should pay the Heriot? But upon this Point they seemed cautious of delivering any Opinion, but reserved themselves till that Matter would come to be a Question, for they said it was worth Consideration.

Powell seemed to incline, That if Assignee had died, living the Copyholder, the Lord should immediately have the Land; for the whole Interest of Copyholder was vested in him by the Statute; and Powys thought, that upon Death of Copyholder the Estate of Assignee would determine, tho' the Cestuy que Vies were living.

Here it was agreed, that if the Grant had been to A. for the Lives of B. C. D. and A. dies, the Lord should have the Land again, tho' against his own Limitation, because there can be no Occupant of a Copyhold Estate without a special Custom; and this would be no Dischief, because the Failure would be on the Side of the Grantee only: For if Rent be granted to one for three Lives, and he dies without Disposition, living Cestuy que Vies, yet Grantor shall hold the Land discharged, because Occupancy cannot be of a Rent, for that only can be of Lands which pass by Livery, whereby the Freehold passed, and shall not revert again till Limitation be determined, and it is for the Sake of a Præcipe of a Stranger; and per tot' Cur', The Grant held Good. And the same Objection of Bankruptcy might be made in Ven & Howel's Case.

Leonard and Stacy, at Guildhall, coram Holt Ch. J.

Vide postea
139.
Replevin upon
Defendant's
being cheated
in Bargain.

THE Case was: A Cheat bought a Quantity of Goods from the Defendant upon Credit, and sold them to the Plaintiff: The Defendant discovering that he was caught, and that the Goods were come to the Plaintiff's Warehouse, takes out a Replevin out of the Sheriff's Court in London, and with several others takes the Goods

Goods again, and for this the Plaintiff brought Trespass. And in this Case, Holt, Ch. J. said:

1. That in Replevin, if Property be claimed, and notwithstanding, ing Party replevies, Trespass will lie, and the Claim or Notice of Property shall be the sole Issue. Vide post 81, 103. 1 Salk. 5, 94. 2 Lev. 92.

2. That whereas several are declared against, and some under a Simul cum, to take of the Evidence of those that come under the Simul cum, something must be proved against them, and likewise Endeavours used to take them, as Process taken out against them, &c. 1 Vent 127. Ld. Raym. 984.

3. If Trespass be against two or more, and one demur, and another pleads to Issue, the Damages assessed upon the Issue shall affect him that demurred, if the Demurrer be ruled against him: So if Trespass be for breaking House, and entering into a Close, against one who pleads Not guilty as to one, and demurs to the other, there the Jury must find Damage severally for the Not guilty, and conditional upon the Demurrer: So if there be two Defendants, and they vary their Pleas as to the Parcels in the Declaration. Some of the Defendants here would give Evidence, that they were no farther concerned, than as Appraisers to appraise the Goods. To which the Chief Justice answered, There could be no Appraisement in Replevin, and if there could, that however here the Taking being tortious, he, being there all the while, would be guilty of it; besides, if the Law gives a Man a Licence for the doing a Thing, in Trespass you must plead it, and not give it in Evidence upon Not guilty. Issue and Demurrer. If Appraisement may be in Replevin. Licence to be pleaded.

Barber *versus* Dennis.

1 Salk. 68.
S. C.

THE Widow of a Waterman, who, as was said, by the Usage of Waterman's Hall may take an Apprentice, had her Apprentice taken from her, and put on Board a Queen's Ship, where he earned two Tickets, which came to the Defendant's Hands, and for which the Mistress brought Trover: And it was agreed, the Action would well lie, if the Apprentice were a legal Apprentice, for his Possession would be that of his Master, and whatever he earns shall go to his Master. But it was objected, 1. That the Company of Watermen is a voluntary Society, and that, being free of it, does not make a Man free of London: So that the Custom of London, for Persons under One and twenty to bind themselves Apprentices, does not extend to Watermen, which was agreed by all. Then it was said, The supposed Apprentice here was no legal Apprentice, if the Indentures be not enrolled pursuant to the Act of Parliament of 5 Eliz. and if he were not a legal Apprentice, Plaintiff had no Title. But Holt, Ch. J. said, He would understand him an Apprentice or Servant de facto, and that would suffice against them being Wrong-doers. An Apprentice to a Waterman's Widow. Vide ante 58. Cas. temp. W. 3. 415. Extends not to a Freedom of London. But Trover lies for his Tickets, &c.

Note; In another Case, which was Action of Covenant against an Apprentice for leaving his Service, Holt, Ch. J. held these two Points:

T

1. That

If a Master
may recal his
Licence to an
Apprentice,
&c.

1. That if a Master does licence his Apprentice to leave him, he cannot after recal that Licence.

2. That if a Master bying Covenant for leaving his Service at such a Time, and Defendant justifies by Virtue of a Licence at that Time, the Master cannot upon that Declaration give Evidence of a Leaving him at another Time, for there the Time is material, and is not like a transitory Matter in Trespas.

Brigs versus Collingson, in C. B.

Trespas for
entring Plain-
tiff's House,
and taking
away his
Goods, &c.
Caf. temp.
Mac. 25.
Ld. Raym.
712, 410, 465,
1530, 902,
1054, 1140,
1482.
1 Mod. Caf.
in L. & Eq.
120.
Stra. 637, 820,
509, 1184.
Justification by
Process of in-
ferior Court
for Appea-
rance, but an-
swer not to the

Trespas for breaking Plaintiff's House, and entering into it, and taking and carrying such and such Goods to such and such a Value: Defendant pleads Not guilty as to the breaking the House, and justifies quoad entring, taking and carrying away the Goods; for that K. is an antient Borough, in which there is an antient Court to be held by Vertue of Letters Patents, & consuetud' Cur' præd', every three Weeks on Thursday; and that it has Conuzance of all Debts and Actions arising within, &c. not exceeding 40l. That such a Day and Year J. S. did there levy a Plaint for 15l. against the Plaintiff for a Cause arising within their Jurisdiction, found Pledges, and made Protestation to follow, &c. That thereupon a Process was directed to Defendant to seize his Goods and Chattels, in order to bying him to appear; that by Virtue thereof they did attach him by his Goods and Chattels in the Declaration mentioned, and them safely kept to the Intent to compel an Appearance: And on Demurrer to the Plea, Carthew took several Exceptions:

carrying them away. Vide Co. Lit. 145. 3 Lev. 281.

Obj. *Virtute
ejus, if tra-
versable.*

Delivery of
Writ.

Licence of
Law, &c.
8 Co. 146,
747.

1. They shew the Court to be held by Letters Patents and Custom, which is repugnant.

2. It is said to be held according to the Custom of the said Court, which is absurd; for it should be, by Custom of the Mill or Borough in which it is held.

3. It is not said, the Process was delivered to them, so as they might execute it; and the Virtute ejus is not traversable, and therefore in all Pleadings where the Sheriff justifies by Virtue of a Writ, he alledges, that before the Execution the Writ was delivered to him, and the Virtute comes after, otherwise any Body might take upon himself to execute a Writ sued out, tho' not delivered to him.

4. The Attachment ought to be moderate and reasonable, as to the Value of 12d. 18d. or 2s. at first; and if he did not appear upon that, to double that infinitely, and here they have taken all the Party's Goods; so that if we had come with Affidavits of this Oppression, you would have granted an Attachment for the Abuse; and if one abuses the Authority the Law gives him, he is a Trespasser ab initio, for the Diversity is between Licence of Law when abused, and actual Licence of the Party. Vide 8 Co. 146. Carpenter's Case.

5. We charge them in Declaration with having taken the Goods, and carried them away; and they justify only the Taking, and say nothing as to the carrying away.

6. Though

6. Though they were aware, they must shew a Return; for when ever the Sheriff, or Officer to whom the Writ is directed, will justify under it, he must shew a Return, otherwise if under Bailiffs to Sheriff. Cr. Car. 446, 447; and here they only say, Debito modo retornat', which might be if they had returned Nulla bona: And Court could not make them mend or change it.

Return of
the Writ not
shewn.

Prat contra. As to the first Exception; We shew the Court was held by several Letters Patents, and we need not shew by what King or Queen, or the Date of them; and as to consuet' without tempore cujus, &c. it does not imply a Prescription, but only an Usage.

Resp. Court
held by Letters
Patents, &c.

Objection. Not said the Process was delivered to Defendant.

Answer. We are upon a general Demurrer, and we say it was directed to us, and that by Vertue of it we seized them, which is impossible to be true if it were not delivered to us.

General De-
murrer.

Objection. But they ought not to take so much.

Answer. The Process is to attach him per Bona & Catalla; and the Law does not define how much they shall take; and it is in Plaintiff's Power to have all by giving an Appearance, and they are only to be a Pledge for his Appearance in the mean Time.

Objection. We ought to make a Return true, and we have so done; for when we confess that we have taken the Goods, and alledge a Return Debito modo, that must be according to Truth.

Return Debito
modo.

Trevor, Ch. J. You have not answered the carrying away, so it is not within your Not guilty, nor admitted by your Justification; for if you justified the carrying them away, perhaps you would have given them a new Cause of Demurrer, for they should not have carried them away till Failure of Appearance: As to the Excess, that will not make it a Trespass, for that is only an Irregularity; and your saying in the Declaration, that they were of such Values, is nothing.

Goods ought
not to have
been carried
away till Fai-
lure of Ap-
pearance.

Cur' accord', and seemed strong for the Plaintiff for Want of Answer to Asportation', but gave him Time till next Term to maintain it.

Bishop of Durham *versus* Ladler, in B. C.

DEBT was upon a Bond, conditioned for the Obligator's Submission to the Church: The Bond was given in the Year 1693. and there being a general Act of Pardon since that Time, the Question was, Whether since that Act took away the Offence and Excommunication, it would not likewise discharge the Bond? And the Case of the Bishop of Exeter and Sterling in my Lord Hale's Time, now in Levinz's Reports, was remembered and said, That there never was any Judgment upon the Roll; and it went over to be spoke to this Term.

Debt upon a
Bond given to
a Bishop for
Submission,
&c.

Vid. 2 Lev 36.

Michelson *versus* Cawfey, in C. B.

Case for an
Escape upon
Process out of
an inferior
Court.

8 Co. 133.
Vide Vaug.

93, 94.

Yelv. 46.

Cro. El. 489.

Cro. Jac. 184.

493, 532.

Cro. Car. 46.

1 Jo. 451.

Ld. Raym.

424, 425, 555.

651, 705, 230,

788, 1530.

Caf. temp. W.

3. 598. Caf. temp. An. 50, 51. Stra. 873, 901, 951, 1226.

If a Stranger
ought to shew
the Authority
of the Court.

Vide postea.

It seems he
ought to shew
the Authority
of the Court.

AN Action upon the Case, for the Escape of one taken upon the Process of an inferior Court. Plaintiff declared, that he levied a Plaint such a Day, &c. That Process issued, and was delivered to the Defendant, who, Virtute thereof, took the Party at such a Place, &c. and suffered him to escape, per quod, &c.

And the Exception taken to the Declaration was, That it did not shew by what Authority the Court was held, and then the whole Proceedings were void, and therefore the Imprisonment was false, and the Escape no Offence or Injury to the Plaintiff: And for this was quoted Turner's Case, where, in pleading a Judgment in an inferior Court, the Party was forced to shew the Authority of the Court, and to give it Jurisdiction. And if so in a Plea in Bar, which is good to a common Intent, a fortiori it will be in a Declaration which charges the Party, and therefore must be certain to all Intents: And here if there were no legal Court, or if it wanted Jurisdiction, the Officer would be liable to an Action of false Imprisonment, and likewise to an Escape. And it was said, That it is essentially necessary, let the Plaintiff be a Stranger or Privy, to give the Court Jurisdiction.

To which Carthew answered with this Diversity, that any who is an Officer of the Court, or acts under the Authority of it, and by Consequence ought to be consulant of it, ought in Pleading to set it forth; but Strangers, as the Plaintiff is here, need not do it. 2. The Plaint, Process and Arrest, are only Inducements to the Action, and the Escape, whereby, &c. is the Substance; therefore it suffices if the Substance be well set forth, and that is done here. And for this he quoted the Case of Hodges and Moyse, 1 Cro. 45, 46. Besides, he urged that this would be the Cause of Reversal or Irregularity, yet Sheriff could not take Advantage of it. Vid. Cro. El. 895. 2 Mod. 195. and Gould and Stroud, Mich. 2 W. 3. in B. R. where, in an Escape against Sheriff, it appeared that the Action was brought upon a Judgment in Westminster-Hall by an Administrator, and that Administration was committed to him by an Ordinary of another Diocese, so as it was utterly void; yet Plaintiff had Judgment.

Trevor, Ch. J. and Blencoe, conceived the Law to be, That wherever one Justifies by Vertue of Proceedings of an inferior Court, or makes it a Ground for an Action, he ought to shew the Authority by which the Court is holden, and that the whole Proceedings were the Gift of the Action here, and if that were actually void, that the Plaintiff ought not to have Judgment, tho' Officer cannot take Advantage upon Error in Process; but they doubted whether the Defendant, having taken upon himself to arrest him, did not thereby make himself liable to an Escape. But Tracy seemed to differ from them, upon the Authority of 1 Cro. 46. And it was Cur' advisare vult.

Eodem

Eodem Termino in B. R.

Warren *versus* Matthews.1 Salk. 357.
S. C.

Per Cur. **E**very Subject of common Right may fish with lawful Nets, &c. in a navigable River, as well as in the Sea, and the King's Grant cannot bar them thereof; But the Crown only has a Right to Royal Fish, and that the King may only grant.

Lawful Fishing.
Ld. Raym. 725.
Vide 2 Salk. 637.

They also held, That let the Prosecution be never so maliciously carried on, yet if there be probable Cause or Ground for it, no Action for malicious Prosecution will lie. Vide 1 Salk. 14, 15. contra.

Malicious Prosecution.
1 Salk. 14, cont.
Ld. Raym.

81, 377, 378, 380, 381. Vide post 216.

Saunders *versus* Melhuish.

Ante 16. S. C.

Melhuish had got an unknown Person to assume the Name of Tenant in Possession, and to personate him in receiving a Declaration in Ejectment, and upon the usual Affidavit tricked the Plaintiff out of his Possession; and the Matter being made out by Affidavits, and even by the Affidavits of the two Comrogues, viz. he that delivered, and the other that received the Declaration, the Court ordered Restitution; for no Man's Possession ought to be disturbed upon the Affidavits of such infamous Witnesses. And Melhuish, the Plaintiff in Ejectment, attending, was committed to answer Interrogatories; for Holt, Ch. J. said, When one is put to answer Interrogatories for a Fact fully proved against him, he ought to answer in Custody; but where it is any thing doubtful, the Course is to put him to answer, that is, to bind him by Recognizance to answer. And in either Case, if they purge themselves upon Oath, they are discharged; but they may be prosecuted for Perjury if they swear false. And if the Interrogatories be not exhibited in four Days, by Course of the Court they are discharged.

In Ejectment one trick'd out of Possession.
Caf. temp. W. 3. 211, 313, 318, 398, 445, 653, 656.
1 Barnes 125, 127.
2 Barnes 157, 158.
Commitment to answer Interrogatories.The Case of *Elderton, Porter*, and others.

Ld. Raym. 978. S. C.

They were taken up by a Warrant from my Lord High Steward, Treasurer, Controller, and Clerk of the Green-Cloth, setting forth a Complaint made to the Board of Green-Cloth, of a forcible Entry made by them into a House in Scotland-Yard, in the Queen's Royal Palace of Whitehall, riotously, and in Contempt of the Privileges of the Queen's Palace, and without Warrant from the Green-Cloth. The Warrant was directed Portatoribus Virgarum Hospitii of the Queen, and they not giving Bail, were committed to Lovet, Porter of the Palace, to receive and keep them till they give Bail for Appearance at the next Sessions to be held for the Uerge, or till he received further Directions from the Board of Green-Cloth; and

Contempt against the Privilege of the Queen's Palace.
Vide 1 Mod. 76.
1 Vent. 169.
2 Mod. 181.
Philip's Regale necessarium, chap. 1 & 3.
Pryn on 4 Inst. 18, 19.
Caf. temp. W. 3. 102, 155, 156.

Vide infra. being brought up by Habeas Corpus, Return was made of a Commitment for the Cause aforesaid, by the Persons aforesaid, all which were returned to be Justices of Peace for the Verge.

1. Objection. Montague took these Exceptions: 1. The Warrant sets forth an Information made to this Board, without shewing what Board; and if it had expressed the Board of Green Cloth, it had not mended the Matter; for as such their Power is only over the Servants of the Family, and over none else, even in case of Trespass or Bloodshed, or any other Breach of the Peace; for that which gives them a Power is the Statute of 33 H. 8. c. 12. and therefore they have no farther Authority than that Act gives them.

2. That the Queen did not reside there. 2. The Queen did not then actually reside there, nor does it set forth that she did, and it cannot be said a Breach of Privilege, for two Reasons: 1. The Queen's Honour is as much concerned that the Process of Law should be duly executed, as in the Privilege of her Palace. 2. By the late Act of Parliament all Privileges are taken away; and that Act is to be construed favourably in the Execution of Justice.

Ld. Raym. 65, 66, 100, 213, 323, 353, 396, 424. 3. If it be said, that they have Consuance of it as Justices of Peace, they should have committed them as such, and under a proper Officer, as Constable, &c.

No legal Commitment as to Time. 4. The Conclusion of the Commitment is not legal; for it should be, till they are delivered by due Course of Law, but this is, till they find Surety for their Appearance at the next Court of the Verge, and not said when that is to be, or that ever there will be any.

The Privileges set forth. 5. They say, it was in Breach of the Privilege of the Queen's Court, but not what those Privileges are, that the Court might judge whether this Fact be against them.

Argument for the Return. Attorney General: For the Return, the Authority of the Party committing never appears upon the Commitment, but always upon the Return, and that is the right Way.

Objection. They have no Power to commit as a Board.

Answer. It is not necessary to enquire into their Power as they are a Board now, for tho' they meet there about other Business, yet their being there does not make them cease to be Justices of the Peace, and they have their Sessions for the Verge, and the Commitment is, till they find Surety for their Appearance at the next Sessions of the Verge. It never was the Intent of the late Statute to expose the Queen's Palace to the Disorder that often attends Execution of Process: And he quoted Jacob Hall's Case.

Vid. 3 Inst. 141. 27 Ass. pl. 49. Philips Regale necessarium, cap. 1. & 3. & vide Wilkins LL. Ethelstani. p. 63. & Hen. 1. p. 245. There needs not an Act of Parliament to make a Palace, for it is the King's Right to declare a Royal Palace, and the Privileges follow of Consequence, and King William declared Kensington a Palace.

Warrants

Warrants are not like Pleadings, as being made by Persons entrusted with the Execution of the Law, but have not the nice Knowledge of it.

Of Commitments. Vid. 1 Salk. 348, 349, 351, &c. Commitment till Bail.

Commitment till he find Bail, or Commitment generally for Want of Bail, is the same; for whoever is committed for Want of Bail, is in Truth committed till he find Bail.

Where-ever there is a Palace, the Privilege of a Palace is incident to it, whether there be an actual Residence or not; and the Act of 33 H. 8. c. 12. was needless, tho' it makes this Case the stronger, and that Statute setting Limits to Whitehall, shews there are local Privileges belonging to the Palace; and what can they be if not that something may be lawfully done elsewhere that may not be so there? And this being in the outward Part of the Palace makes no Difference, for they shall set no other Bounds to Privileges than the Act has done here.

Holt. Ch. J. It need not appear in the Warrant or Commitment that they were Justices of Peace, but is always upon the Return, and these Fellows are very wilful, for either they are right or wrong, and why may not they find Bail, and have the Matter determined legally? There is a Commission of Oyer and Terminer, and a Commission of the Peace for the Berge; and the Lord Steward has only a Commission for the Household. The

Upon the Return.

Matter therefore will be only this, Whether this being done with in the Queen's Palace, and not said the Queen was actually residing there; that is, Whether the Privilege be not confined to the Residence? And another Question will be, in case it be confined to a Residence, What will amount to a Residence? For suppose the Queen were at Windsor, and a Murder committed at Whitehall, should the Lord Steward judge of it upon the Statute of H. 8? Or suppose it were now at Winchester? To which the Attorney put the Case of Burchett, 3 Inst. 140. who killed his Keeper in the Tower: And tho' the King did not reside there, yet because it was in his Palace, his Hand was cut off first, and after he was hanged. And tho' the Words of the Statute be, [Or other House where the King is resident,] those Words are only to give the same Privileges to Houses that are not Palaces during the King's Residence.

The chief Matter, what.

As to the King's Residence.

As to the Objection, That they are committed for not giving Security to appear at the Sessions of the Berge, and it does not appear that they have Jurisdiction of it, we are judicially to take Notice of all Things belonging to the Queen, and by Consequence of the Power and Jurisdiction of the Session of the Berge of the Palace.

If no Jurisdiction appears.

Powel. Sure the Words [Other Houses where the King resides] is only applicable to Houses, not Palaces, and sure the Privilege of a Palace is not confined to actual Residence; and he insisted on Burchett's Case aforesaid, and the other two Judges seemed of that Opinion: And besides, if it were confined to a Residence,

If the Privilege be confined to Residence.

Vide infra.

Arrests in
Westminster-
Hall.

Officers of
Green-Cloth
Justices of
Peace, &c.

Commitment
to the Mar-
shal, &c.

Commitment
to New-Pri-
son. Univer-
sal Power of
B. R.

Court re-
manded the
Prisoners
without Bail.

Residence, the Queen's Secretary of State keeping his Office here, would be good Evidence of a Residence. And Powell said, he had known Arrests condemned for being in Whitehall without Leave; and if Arrest be in Westminster-Hall, sitting Court, it is a Contempt; and why may not it be the same if in the Queen's Palace, to the Disturbance of the Queen or her Servants? And the Consequence might be very dangerous, to suffer a Number of Fellows in a rude Manner, under Colour of Process, to enter into the Queen's Palace. It is true, we do not know in this Court that Green-Cloth have Jurisdiction here, but they are returned to be Justices of the Peace, and we know there is a Commission of the Peace, and of Oyer and Terminer, for the Clerge, which have Power to punish Riots, Trespasses, &c. He said farther, That the Marshal of the Queen's House is the Gaoler, and that the Commitment properly ought to be to him; but perhaps it might be to the Porter, in order to carry him to the Marshal, as in this Court to a Tipstaff; but still the Commitment ought to be to the Marshal, and their Authority is to commit as Justices of Peace, and not as a Board. It is true, if the Commitment had been by them generally, we would have understood it to have been in that Capacity that they lawfully could do it; but whether they have not tied it up to their Power as Board of Green-Cloth, so as to leave no Room for such Intendment, is a Question. However, if the Commitment should be bad for these Faults, we may indeed discharge them of their present Imprisonment, and bind them to appear at Sessions of Green-Cloth; as if Commitment be to New-Prison, it is not lawful, as not being a legal Gaol; yet we will not set the Party at Liberty, but commit him legally by Virtue of the Universal Power of the Court: And tho' this Porter be not a proper Officer, we may remand him to him till we consider of the Matter, and order him to be brought up again by Rule, and all Batters to stay in the mean Time as they are.

And after the Return was filed, tho' they offered Bail for their Appearance here the last Day of Term, yet the Court remanded them, and gave Rule for the bringing them up two Days after, and would not bail them in the mean Time.

3 Inst. 140.

Nota.

3 Inst. 549.

Vide 2 E. 3.

13 & 19 E. 3.

F. Judgment

174. 51 E. 3.

F. Coron. 280. Dyer 188. St. 25 E. 3. c. 1. and note 33 H. 8. c. 12. of striking in the King's Court. 3 Inst. cap. Misprision. Philip Regale necessarium, 18, 24, &c. 39 E. 3. 4, 35. Mich. 40 E. 3. 4, 34. Flet. lib. 2. c. 23. Ryley plac. parl. 6, 7, 27. Ass. 49. Pryn on 4 Inst. 18, 19. Cotton, &c. 1 Lev. 106, 107. 1 Sid. 211. Cro. Car. 272.

Note; The Chief Justice upon this Occasion ordered the Record of Burchett's Attainder to be brought into Court, and it is Mich. 15 and 16 El. Ro. 2. and there is no Judgment there that his Hand should be cut off, tho' the Chief Justice said his Hand had been in Truth cut off, and so is my Lord Coke and Stow's History, and nothing further was ever done in this Matter that I have found. But vide postea.

Overseers of the Poor of the Parish of St. *Andrew*.

2 Salk. 525.
S. C.

AN Order of two Justices for one's taking upon him the Office of Overseer of the Poor being removed; several Exceptions were taken against it by Montague: 1st, That it did not appear by it that the Party was an Inhabitant or a House-keeper, and you will not intend him to be either; for it is not like the Case in Hob. 312. where a Man shall be intended to be in his Senses, or a Witness credible, till the contrary appears: And the Way were for the Parish to present these Officers to the Justices to be by them confirmed. 2. Exception was, The Order appointed him Overseer of the Poor of that Part of the Parish that lies in Middlesex, (for the Parish of St. Andrew extends both in London and Middlesex); and for this the Case of the House of Correction for Black-heath was relied on. And the Court seemed to think the Appointment ought to have been for the whole Parish, but after they might order him to meddle only with such a Division.

If Justices may replace an Overseer removed. Vide post 97.

Ld. Raym. 1394.

Note; Per Holt, Ch. J. at Nisi prius, ut audivi, this Difference was taken: If a civil Action be brought as Trover for Goods, after Recovery, you may indict him for Trespass or Felony for the same Taking, because the Offences or Causes of Action are of a different Nature, the one civil, and the other criminal; but if the first Prosecution had been criminal, as an Indictment for Trespass, &c. and the Crime appears to be Felony, there you cannot have Verdict or Judgment on the Indictment for Trespass, it being the inferior. And this, he said, had been adjudged in Mr. Luttrell's Case.

Indictment lies after Recovery, in Trover, or not. 3 Inst. 213. Hob. 138. Vide 2 Lev. 208. Videt' contra.

Jordan versus Thomkins.

1 Salk. 25.
Vide ib. 22, 29.

INdebit' assumpsit for Heat, Drink and Lodging found for a third Person; and moved in Arrest of Judgment, that it would not lie, but a special Action upon the Case. But per Cur', It lies against him upon the Contract; as if A. desire B. to cure the Horse of C. and that he (A.) will pay him so much, an Indebit' will lie against A. and only against him; but they agreed it would not lie for Money won at Play, but a special Assumpsit; and the Plaintiff had Judgment.

Ld. Raym. 982. S. C. Indeb. assump- sit lies for Diet found for a third Person. Hob. 216. 1 Vent. 6. Raym. 302. Vide postea.

Per Cur'. If one give a Warrant of Attorney to confess a Judgment for the saving Bail harmless, tho' the Debt be not paid, he cannot sue Execution before Damnification.

Smith *versus* The Mayor and Aldermen of London.

If Prohibition
lies for refu-
sing appear-
ance of a 3d
Consignee in
London.

ONE who had been broke, and run away beyond Sea, had con-
signed Goods to three Persons here for the equal Benefit of
his Creditors, two whereof were his Consignees, and set up a
Trustee for them to attach the Goods in London; the third Con-
signee, to whom nothing is due, offered to appear, the other two
would not appear: And the Court would not receive the third
Man's Appearance without he appeared for all, which he could
not justify doing, having no Warrant for it: And now a Prohibi-
tion was moved for, because they refused his Plea.

When Bill of
Exceptions or
Error.
1 Salk. 288,
289.

Holt, Ch. Just. If they refuse your Plea, your Way is by
Bill of Exceptions; if they proceed otherwise erroneously, you
may have a Writ of Error; and we are not to prohibit inferior
Courts because they proceed against Law, for in that Case the
Law gives another Remedy.

Process upon
an Attach-
ment in Lon-
don.

See Skinner
516 & 669.
Caf. temp.
W. 3. 213,
249, 320,
326, 407,
45.
No Certiorari
in this Case.

Upon an Attachment of Goods there goes a Sci' fa' by way of
Garnishment, and two of the Garnishees will not appear; the
third offers to appear and plead, but is not admitted without ap-
pearing for all. Sure this Course is of very ill Consequence,
and here we can have no Bill of Exceptions, because we are not
in Court till Appearance; and they will not suffer us to appear,
though Bill of Exceptions be always of Matter not appearing of
Record: And the Court were strong against the Custom to com-
pel one Garnishee to appear for the rest; and here they said, There
could be no Certiorari, because they could not proceed in this
Court according to the Custom of London.

He may wage
his Law
alone, &c.

And Dee, the Common Serjeant, said, That in such Case, if he
put in Bail, and waged his Law alone, that would have dissolved
the Attachment: This Case was put: If Præcipe be brought
against two, and one of them appears, and takes the whole Tenancy
upon himself, and traverses the other's having any Thing, and
pleads in chief, he may do it: And Cur' advisare vult.

Domina Regina *versus* Ball.

If Excommu-
nicant escapes.
Ld. Raym.
788, 927,
1028.
Caf. temp.
W. 3. 275.
Stra. 901.
Vid antea.
He may be
taken *de novo*,
if no Writ
returned, &c.

HE was charged in the Sheriff's Custody upon an Excommu-
nicato capiendo, and committed to the Fleet charged there-
with, and from thence by Habeas Corpus to the King's Bench, where
he was suffered to escape; And what could be done, was the Que-
stion. And first it was agreed, That if the first Writ were not
returned, they might take a new one, and thereupon take him up
de Novo; otherwise if it were return'd, 1 Roll. Rep. 174. And
here it was doubted, whether there could be a new Writ in case
the

the former had not been return'd; because by the Habeas Corpus and Return thereof here on Record, it does appear he was in Execution upon that Writ: If the Escape had been in the present Marshal's Time, we could make a Rule upon him to take him up, but we cannot do it now, the Escape having been in former Marshal's Time; because if the Escape were voluntary, the former Marshal could not justify doing it himself, and let us consider whether we cannot make a Record of his having escaped, and award a new Writ. And per Cur', Let it stay a little, and know whether the former Writ be returned.

Johnson *versus* Shepney.

A Ship being in Distress on the High Sea in her Voyage, put into Bostock in New-England, and there was hypothecated by the Master for Necessaries; and being libelled against here, a Prohibition was moved for, because the Contract appeared to be upon Land, even on their own Libel. And it was urged against it, That if the Distress, which occasions the Contract, be on Sea, tho' the Things be bargained and agreed for at Land, (for it is not to be supposed they can be had at Sea) in case of Hypothecation they have Jurisdiction, otherwise the Prejudice would be intolerable to Navigation. And Benson *versus* Jeoffries, Hill. 96. was quoted.

Holt, Ch. Just. When a Ship is in Distress in her Voyage, and hypothecated for Necessaries, we allow the Admiralty a Jurisdiction, for there is no other Way for him to have Credit but that, and they can have no Remedy by our Law against the Ship; and this Point was argued and resolved by all the Judges in the Case of Croftwick *versus* Lowfely, 1 W. & M. Vide 1 Salk. 34.

That the Admiralty has the Jurisdiction. Ld. Raym. 152, 577, 805, 806, 933. Cas. temp. W. Stra. 695.

And Powel added, That though in that Case the Libel laid the Contract to have been super altum Mare, yet the Court took Notice of it as done at Rotterdam; but being in the Voyage, and occasion'd by a Stress at Sea, it was held well enough within their Jurisdiction; and that the Hypothecation of Ships is absolutely necessary for the Preservation of Navigation; for the Masters have nothing else to get Credit with, and they are the Only Court can give them Remedy: If a Ship in Harbour here in England be hypothecated, they shall not sue for it there; Master cannot at any time sell, but he may hypothecate in Voyage for Necessaries: But the Libel being against the Ship and Party, the Court said, They would send a Prohibition as to him, unless quatenus it is necessary to make him Party towards the Condemnation of the Ship: And so it was done. For Prohibitions to the Admiralty and other Matters concerning that Court, see *Cartbew* 26, 32, 166, 294, 398, 423, 474, and 518. See also *Skinner* 59, 93, 230, 279, 334, 361.

1 Salk. 35.

S. C.

Ld. Raym.

982. S. C.

Vide ib. 34.

Vide ante 11.

12, 25.

Ship in Di-

stress pawned

by the Master,

if Prohibition

may be to a

Libel.

Vide Hob.

12.

1 Vent. 32,

238.

1 Lev. 267.

1 Sid. 418.

2 Keb. 511,

610. ante 12.

Vide Hob.

12. acc.

Moll. Lib. 2.

c. 2. §. 14,

15.

3 Mod. 244.

3. 406, 511.

Vide Hob.

12. contra.

Latch 252.

Vide 1 Vent.

32.

1 Lev. 267.

Such Hypo-

thecation is

absolutely

necessary.

1 Lev. 267.

1 Vent. 32.

Hob. 115.

contra.

Prohibition

as to the

Party, &c.

2 Salk. 640.
S. C.
Ld. Raym.
985. S. C.
Trespals tem-
pore W. 3.
cont. Pacem
Q. Ann.

Ld. Raym.
879.

Day *versus* Musket.

Trespals in Time of King William, and so laid with a contra Pacem of the present Queen; and this was said to be a Description of the Trespals, and an impossible One, and therefore not good: Against which was quoted 1 Sid. 253. that Trespals in two Kings Reigns ought of Right to be laid contra Pacem of both; but however, that was but Form. But Powel quoted the Case of Melwood and Leach, 7 W. & M. where it was held fatal: And the Court said, That many Actions upon the Case for Nisfeazance are laid contra Pacem, and it is not wrong to do so, as in Actions for Nuisance.

Ill upon a
Demurrer,
tho' help'd
after Ver-
dict.

And at another Day the Court said, That the Omission of contra Pacem might be but Form, but being put in is a Description of the Trespals, which is repugnant, and held that it would be well after Verdict; but it was on Demurrer, and therefore fatal. Vid. 2 Ed. 4. 24. And the Plaintiff had Leave to discontinue upon Payment of Costs. Vid. Stat. 4 & 5 Ann. cap. 16.

Vide 5 Mod.
304.
Ld. Raym.
986. S. C.
Abatement to
an Addition
of Gentle-
man.

Skinner 15.
1 Lut. 238.
Raym. 449.
5 Mod. 304.
Eq. 51, 52.

Battersby *and* Marsh.

Plaintiff in his Bill declared, and called himself a Gentleman: Defendant pleaded in Abatement, that he was no Gentleman; to which Plaintiff demurr'd.

Per Cur', The Plea is good, being confess'd by the Demurrer; but it being after general Imparance, they put him to answer over.

Post 105. Ld. Raym. 849, 859, 1179, 1541. Cas. temp. W. 3. 249. 1 Mod. Cas. in L. & 3 Wms. 65. Comyns 371. Stra. 556, 816.

Ld. Raym.
992. S. C.
Error upon
an Inland Bill
of Exchange
not protested.

Ld. Raym.
743.
Cas. temp.
W. 3. 309,
310, 345.

Brough *versus* Perkins, Trin. 2 Ann.

Writ of Error of a Judgment upon Nil dicit in Common Pleas, in an Action brought against the Drawer of an Inland Bill of Exchange: And now Raymond objected, That since the Act of 9 W. 3. no Damages shall be recovered against the Drawer upon a Bill of Exchange without a Protest, and therefore the Action lies not, here being none.

But Holt, Ch. Just. The Statute never meant to destroy the Action for Want of a Protest, but only to deprive the Party from recovering Interest and Costs upon an Inland Bill against the Drawer without Notice of Non-payment by Protest; for before the Statute there was this Difference between Foreign and Inland Bills of Exchange: If a Bill were Foreign, one could not resort to the Drawer for Non-acceptance or Non-payment without a Protest, and reasonable Notice thereof; but in case of Inland Bill, there was no Occasion for a Protest; but if any Prejudice happen'd to the Drawer by the Non-payment of Drawee, and that for Want of Notice of Non-payment, which he to whom

Difference of
Bills.
Ante 29, 30.

whom the Bill is made ought to give, the Drawer was not liable; and the Words Damages in the Statute were meant only of the Damages that Party is at in being longer out of his Money by the Non-payment of Drawee, than the Tenor of the Bill purposed, and not of Damages for the original Debt: And the Protest was ordered for the Benefit of the Drawer; for if any Damages accrue to Drawer for Want of Protest, that shall be born by him to whom the Bill is made; and if no Damages accrues to him, then there is no harm done him; and Protest is only to give formal Notice that the Bill is not accepted, or accepted and not paid; and if in such Case the Damage amount to the Value of the Bill, there shall be no Recovery, but otherwise he ought not to lose his Debt; but that ought to appear either in Evidence upon Non Assumpsit, or by special Pleading; and the Act is very obscurely and doubtfully penned, and we ought not by Construction upon such an Act to take away a Man's Right. 'Tot' Cur' accord'.

Protest by Stat.
9 W. 3. is for
Benefit of the
Drawer.
Ante 29.

Another Exception was, That the Writ of Enquiry in Common Pleas is returnable Quinden' Martin', which is always on the 25th of November, a fixed Day, and it is returned as executed the 25th of November ult'; that is, on the Day on which it is returnable, and that is Contradiction.

As to Return
of the Writ of
Inquiry.
See Carthew
70, 362, 371.

But Ch. Just. Holt. Though Writ be returnable on such a Day, yet they never come in till the Quarto die post, and a Writ may be executed on the Day of its Return: And he agreed, They must judicially take Notice on what Day Quinden' Martini falls, because they must take Notice of Festum Sti' Martini, and on what Day it is, and the Almanack is Part of the Law of England, and so of Annus Bissextilis, and that it would be the same in Case of moveable Feasts; for the Diversity between fixed and moveable Feasts is ridiculous; for if we judge of fixed Feasts by the Almanack, as that Book that takes the Diversity admits, why not of the other? But the Almanack to go by is that annexed to the Common Prayer-Book: And Judgment affirmed per tot' Cur'.

Postea 250,
&c.
Ld. Raym.
4, 281, 870,
1557.
Caf. temp.
Mac. 105,
106, 107.
Almanack
V. 1 Leon. 242.
Ante 41.
Post 148,
160, 252.
Judgment
affirmed.

Presgrove *versus* Saunders. Mich. 2 Annæ, in B. R.

1 Sal. 5. S. C.

Intr. Mich. 1 Ann. Rot. 467.

IN Replevin for several Things, as to some the Defendant pleads Property in himself, and to others Property in a Stranger in Bar; and it was objected, That Property in a Stranger could not be pleaded in Bar. 1 Vent. 249. 2 Lev. 92. But Holt, Ch. Just. said, he remembered to have heard Hale make the Difference, That if Property be pleaded in Defendant, it may be either pleaded in Bar or Abatement, if in Stranger only in Abatement; but that upon great Deliberation it had been held since, that there was no Difference at all, for both might be pleaded in Bar, according to 2 Cro. 519. Sackild *versus* Sheton. And Judgment was, Plaintiff Nil capiat per Billam, and Return awarded per Cur'. Parker *versus* Meller.

In Replevin,
Property in a
Stranger may
be pleaded in
Bar on Abate-
ment.
Vid. post 103.
Ante 69.
31 H. 6. 12.
1 Salk. 5, 94.
Ld. Raym.
217, 984,
8017.

Vide 1 Salk.
69, 75.
Post 160.

Robinson *versus* Calwood.

When an Award is ready to be delivered.

Vide postea 160.

1 Cro. 541.

Ld. Raym.

247, 533.

115, 988.

Cal. temp. W. 3. 512, 589, 635.

DEBT upon Bond for Performance of an Award, Condition was to stand to, &c. so it were ready to be delivered at such a Time; Nul Award pleaded, and Award set forth, but not said, that it was ready to be delivered at the Time: And per Holt Ch. Just. As soon as it was made, it was ready to be delivered, and so I remember it has been adjudged, but it stayed upon another Exception.

William *versus* Farrow.

Feoffment and Acceptance pleaded in Satisfaction of a Bond.

Carth. 238,

347.

2 Lev. 165.

Cal. temp. W.

3. 85.

Ld. Raym.

122.

Stra. 426,

615, 573.

1 Salk. 89.
S. C.

DEBT upon Bond laid in London, and Feoffment of Land in another County in Satisfaction thereof; and Acceptance thereof in Satisfaction in the same Ufil was pleaded in Bar, and special Demurer, for that the Acceptance was not laid in London: But per Cur', They must lay the Acceptance where the Feoffment was, it being local; but if it had been a transitory Matter, it should not have made it foreign by his Plea, and when such Plea is local, it ought not to be accepted without Oath of the Truth of it: And Plaintiff had Leave to discontinue upon Payment of Costs.

Lamb *versus* William.

Remittit by Attorney, Retraxit in prop' Persona.

Action was in Common Pleas upon several Damages: The Attorney entered a Remittit damna as to some, and upon Writ of Error it was held the Attorney could well do it, tho' he could not enter a Retraxit, for that must be done in Person.

Ld. Raym.
989. S. C.

Vaughan *versus* Company of Gun-makers in London.

No Mandamus for an Approver of Guns.

Richardson moved for a Mandamus to restore V. to his Place of Approver of Guns, and setting his Mark of Approver upon the Guns made by the Company: And he said, That selling Guns not marked was a Forfeiture of their Charter, and that by a By-Law made by them they had appointed him an Approver, but now turned him out.

Vide antea 18.

Petition to the Queen.

But per Cur', It is a Thing in which the Publick is no way concerned, nor is there any publick Law for it, therefore out of the Reason of Mandamus; but your Way will be to petition the Queen, and she perhaps will order the Attorney General to bring a Quo Warranto against them.

Morley

Morley *versus* Stacker.Vide 1 Salk.
147, 380.

A Warrant of Justice of Peace was given to the Defendant to levy Money by Distress, against one convicted of Deer-stealing according to a late Act of Parliament against Deer-stealers: In pursuance whereof he distrained the Party's Cattle, and sold them for so much absolutely; but before he paid the Money, he was advised that it was dangerous for him to sell the Cattle, for it was doubtful whether the Words of the Act did warrant a Sale: Upon this he comes to Morley, and profered him the Money if he would secure him harmless, which Morley denied to do: Whereupon he undoes the Bargain, and restores the Money to the Buyer, and the Cattle to the first Owner. And now a Mandamus was moved for to compel him to pay the Money to Morley; and this was the more strongly insisted on, for that they could not charge him in any Action without giving the Warrant in Evidence, which was out of their Power in his Custody.

Justices Warrants to levy by Distress upon a Deer-stealer.
Post 214, 215.

Upon a Doubt the Distress was restored by Officer after Sale, &c.

Mandamus moved for, but denied.
Ld. Raym. 581, 582, 584, 990, 1196.

And per Cur', 1. It has been solemnly resolved in the Case of the King v. Speed, that these Words in an Act of Parliament, To be levied by Distress, must be understood of Distress and Sale.

1 Rol. R. 78.
Noy 17. 2 Jo. 25. 1 Brownl. 41.

2. That a Copy of the Warrant would be good Evidence in this Case.

3. If an Officer, who has Power to sell, sells upon Credit when he may sell for ready Money, he is thereby immediately charged to the Party for whom the Sale was.

Defendant's Remedy against the Officer.

4. That in a doubtful Case it is hard to make an Officer sell at his Peril.

Note; In this Case, after the Warrant issued out, a Certiorari was brought, and the Record thereby removed up hither, and that could not hinder the Execution; as if Writ of Error comes to Common Pleas after Execution sued out, the Return of the Writ of Execution must be in the Common Pleas; and if Goods be taken in Execution before the Writ of Error allowed, after the Record is returned here above, a Vendition. Exponas shall go out of Common Pleas.

When a Certiorari may not hinder Execution.
Vide ante 33, 40, 43.

Vide postea 206, 208.

5. That if in this Case the Warrant be not made returnable, the Officer is not bound to return it.

If a Warrant be not made returnable.

6. If the Justices made the Warrant returnable before them, tho' the Record of Conviction be after moved hither by Certiorari, yet they call the Constable to Account upon the Warrant.

7. If before Certiorari comes Execution be done in Part, notwithstanding the Certiorari he may go on with it; as if Execution be out of Common Pleas, and Goods be seized before Writ of Error allowed, notwithstanding Writ of Error, they may proceed to Sale. If this were the Case of a Sheriff, we would compel him to make a Return, and would leave the Party to his Remedy upon the Return: And if a Constable will not return his Warrant, the Sessions may fine him; which

What if the
Officer will
not make a
Return of his
Warrant, &c.

which indeed is no Remedy or Satisfaction to the Party; and the Mischiefe is the same in case of a Sheriff, for if he will not make a Return to a Fieri facias the Court can only amerce him: And the Court would not grant a Mandamus, but left the Plaintiff to that Remedy; for if we would grant a Mandamus, and he disobey it, we could only fine him for the Contempt, and the Justices of Peace may do it as well.

Release to a
Writ of Error,
but no Venue
laid.
Post 88, ante
38.
No Amend-
ment of the
Roll.

A Release was pleaded to a Writ of Error, but no Venue laid to try it; and for that a Demurrer, and Joinder in it, and all entered on the Roll; but the Roll was not brought into Court, or put upon the Book of Rolls: And Eyre now moved to amend it: But per Cur', It cannot be, for it is now a Record by being put on the Roll; but if it had been a Paper, it might be amended upon Payment of Costs.

1 Salk. 5. S.C.
Ld. Raym.
987. S. C.

Lord Banbury versus Wood.

Intr. Mich. 2 Ann. Rot. 398.

Demurrer to
an Abatement
for Want of
Addition in a
Writ *De ho-
mine Repleg'*.
Post 115, 198.
Vide Cro.
Eliz. 897.
Noy 135.
4 Mod. 347.
Caf. temp. W.
3. 211, 199.

In a *Homine Replegiando*, Want of Addition to the Pluries was pleaded in Abatement; and on Demurrer the Question was, Whether this was within the Statute of 1 H. 5. c. 5. of Additions? And that it was, it was argued, that Process of Exigent lies upon this Writ; therefore it is within the very Words of the Statute, and that Exigent lies here, and did so at Common Law: Though it be not expressly *Vi & Armis*, yet it is impliedly so, for it is a Trespass and false Imprisonment; it lies in a Writ of Deceit, tho' it be not *Vi & Armis*, upon the same Reason: Vide 25 H. 6. 6. 2 Roll. Ab. 835. 11 H. 4. 15. And the Reason why Writs of Replevin in the Register are without Addition, is, because that Book is much more ancient than the Statutes of Additions. Vide 2 Inst. 595, 665.

But it is objected, That there was no *Capias* in Replevin till 25 Ed. 3. cap. 5 & 17.

Answer. So it did not lie in Debt or Covenant till given by Acts of Parliament, and yet there must be Addition.

If this differ
from other
Replevins.
Caf. temp. W.
3. 8, 36.

And Holt, Ch. Just. at first inclined strongly, that the Plea was good, and would distinguish this from other Writs of Replevin; for here, he said, the Process of Outlawry issues immediately upon the Pluries *homine Replegiando*, which he affirmed to be a *Withernam* in its self; but in common Replevin the Process of Outlawry is not upon the Pluries *Replegiari*, but upon the *Capias* in *Withernam*, which issues upon the Sheriff's Return of *Averia Elongat.* upon the Pluries; and upon the Sheriff's special Return of the *Capias* in *Withernam*, that is upon the Sheriff's Return of *Nulla bona* on the *Withernam*, there shall go a *Capias* against the Person, and so to Outlawry.

Withernam in
this Case, and
then Outlawry.

But Powell contra. There is no Difference; for in both Cases the Process of Outlawry is upon the *Withernam*, and not upon the original Writ; for in a *Homine Replegiando* there shall go no *Withernam*

nam till Return of the Homine Replegiando : And as the first Withernam in common Replevin must be De Averis, so the first in a Homine Replegiando shall be of the Person.

And at another Day the whole Court awarded a Respondeat Ouster, *Respondeat Ouster* awarded. for the Process of Outlawry lies in a Homine Replegiando ; yet there ought to be no Addition, for the Pluries on which we held Plea here, is not the Original in Replevin, but the original Writ of Replevin is it, which Writ is Vicontiel : So if Replevin be removed by Recordare, tho' upon Withernam thereon there will lie Process of Outlawry, yet there is no Addition according to the Statute ; therefore it is not the Original, and therefore out of the Statute.

2. There being no Addition to the first Replevin, the Pluries, which is indeed an Original to us, must have none, because it must not vary from the first Writ ; and the Statute of 1 H. 5. c. 5. is to be construed strictly ; in an Assize, if the Deseisin be found with Force, there is a Capiatur against the Defendant, and Process of Outlawry thereupon ; yet because it is mixed, and not a personal Action, it is out of the Statute.

And Powell said, There never is an Addition to any Writ that is Vicontiel.

Per Cur', Respondeat Ouster.

Inman *versus* Crew.

Vide 1 Salk.
402.

THE Doubt was, Whether it be necessary an Attorney should be present at the Executing of a Warrant to confess Judgment by one under Arrest by Process of an inferior Court ? And it was agreed,

1. That if one under Arrest confess Judgment in this Court in Presence of a sworn Attorney of Common Pleas, it will be well, and so vice versa.

2. That tho' an Attorney be present, yet if there be Practice in obtaining it, it will be set aside.

3. If one under Arrest by Process of inferior Court, gives Warrant for confessing of Judgment in that Court, we will not set it aside, tho' an Attorney be not present.

4. If one under Arrest by such Process gives Warrant to confess Judgment in this Court, if an Attorney be not by, it will be ill.

5. If a Man be under Arrest, and seemingly discharged by the Bailiffs, with Design that he should give a Warrant of Attorney to confess a Judgment, to stand tho' no Attorney were by, and to retake him in case he did not, gives Warrant for confessing of Judgment, it will be set aside.

6. Though such Person be rally discharged, yet if he has probable Reason to believe himself not to be discharged, and under such Apprehensions he gives a Warrant for confessing of Judgment, it will be set aside. So if under Terror of Arrest. Vide post 163.

Concerning an Attorney's Presence upon a Warrant given by one under Arrest to confess a Judgment
Post 163.
1 Mod. 1.
2 Lil. 47, 434.
5 Mod. 144.
Ld. Raym.
598, 345.
1 Barnes 28,
29, 37, 38,
188.
2 Barnes 36,
51.
Stra. 530,
526, 807, 639,
718, 882, 902,
1245, 1247.
How if the Party be discharged of the Arrest, &c.

Vide 1 Salk.

86, 87.

1 Roll. Abr.

747.

Cas. temp.

W. 3. 251.

1 Will. 593.

Contempt up-

on an Attor-

ney's under-

taking to ap-

pear for a De-

fendant, &c.

Vide antea

42, 16.

Vide 2 Lev. 38.

That Wife

under Age

shall appear

by Guardian.

1 Cro. 161.

2 Cro. 10, 250.

3 Cro. 42, 541.

1 Keb. 241.

1 Ro. R. 287.

Vide 2 Salk.

599, 602.

2 Jo. 228.

Farell. 40, 96.

138.

Two Sci' fac.

of the same

Tesse, ill. See

Carthew 468.

2 Barnes 72.

Where the first

Sci' fac. return-

able ubicunq;

the second ad

Diem apud

West.

Wigg versus Rook & Ux'.

THE Case upon the Report of Mr. Clerk the Secondary, was; A Writ against Husband and Wife, and an Attorney on Sight of the Writ undertook to appear for them, but after would not do it: They delivered a Declaration, which he received de bene esse, and Judgment was entered for Want of a Plea; and the Court set aside the Judgment for Irregularity, but ordered the Attorney to be laid by the heels: And it was said, That if an Attorney undertakes to appear, and after will not do it, upon Summons before a Judge, he shall be compelled to do it. In an Action against Husband and Wife, if Husband will order an Appearance for himself, it will not be received without an Appearance for the Wife too; and for an Attorney to undertake to appear, and not to do it after, is a Contempt of the Court.

Jevon versus Turner.

TWO Sci' fa's were taken out with the same Tesse, but different Returns; the one returnable in Quinden. Hill. and another Craftin. Pur': Though there were different Returns, and at convenient Distance, yet because they were actually taken out at one Time, it was judged wrong: for thus the Party would lose the Benefit of two Sci' fa's, which the Law gives him. Per Cur'.

A Sci' fac' to revive a Judgment against an Executor, mentioned first a Day of Appearance coram nobis ubicunq; but after gave Day to Party to appear, ad præd' Diem apud West', and it was now moved to amend it; but Court said, That it being in the Writ, they could not do it of Grace or Favour, but would give Day to shew Cause why it should not be amended, ex merito Justitiæ; and the Plaintiff for his Expedition moved to quash it.

Horner versus Bonner. Post 96.

If Tithes for
barren Ground
newly cultiva-
ted, &c.

Vide postea

96.

2 Ld. Raym.

991.

PROHIBITION was moved for upon the Statute of Ed. 6. for suing for Tithes of barren Ground newly cultivated; but it was denied, for two Reasons:

1. Because the Suggestion did not alledge it to be suapte natura sterilis.

2. That there was no Affidavit that it was pleaded below.

If Party dies
after Warrant
to confess Judg-
ment, &c.

1 Mod. Cas.

in L. & Eq.

77.

2 Barnes

212, 223.

No Indictment

where Statute

gives a Penalty.

1 Salk. 134.

Show. 398.

3 Mod. 144.

7 Cro. 36.

47, 65, 66.

If a Man gives a Warrant of Attorney to confess Judgment the first Day of Term, and dies, it may be well entered any Time that Term, according to Shelly's Case, and the Dean of Salisbury's Case, and many other Cases. Per Cur'.

It was said to have been resolved in the Case of the Queen and Watson, two Years ago in this Court, and also in one Castle's Case, That where an Act of Parliament gives a particular Penalty, the Party shall not be punished by Indictment: In this Case, the Indictment was for selling Ale without Licence, and it was quashed Nisi.

The

Ld. Raym. 682, 991. Cas. temp. W. 3. 104, 446, 502, 634. Cas. temp. Mac. 337. Fitz G. Stra. 828.

The Queen *versus* Glin & al'.

TH E P were indicted for not producing the Parish Books of Rates before certain Justices of Peace appointed by the rest to examine and make Orders thereupon, and for disobeying such Orders: And it was excepted, That this was a Delegation of their Authority, which they could not do; for tho' it were agreed, That they might appoint some of themselves to examine and state the Matter to them, and then they to make Order thereupon, yet sure they cannot delegate the Power of making Order. 2d Exception was, That Notice of the Order was not alledged.

Where Justices of Peace cannot delegate their Authority to others, to make Rates and Orders, &c.

Vide 2 Salk. 436, 489, 493, 674, 699, 701.

Holt, Ch. Just. I am not satisfied that they can ever refer the Examination of the Matter to a certain Number of themselves, because they are all Judges of the Fact, and therefore they transact it as Judges in Court; but allow they may refer the Examination of the Fact, and reserve the Judgment to themselves, yet doubtless they cannot give a Power to make Rates and Orders. And it was quashed.

Vide ante 77. Post 97, 180, Ld. Raym. 55.

Cunmer *versus* Milton, *Parishes*.

2 Salk. 528, 529. S. C.

A Child was born at Cunmer; the Father, while the Child was under Seven Years of Age, removes to and gains a Settlement in Milton; and this was held a Settlement for the Child: And it was said by the Court, That if a Father be settled in a Parish, and dies, and after his Wife dies in Childbed, he shall be there settled.

Where a Settlement for the Father gains a Settlement for his Child.

Post 213. L. L. of the Poor 74, 75. Cas. temp. W.

If Proceedings be ex Officio in the Spiritual Court; yet if they don't give Copy of Articles, they shall be prohibited quousque: Notwithstanding the Resolution in Moor, per Cur', and granted Prohibition. It was in the Case of—& Bennoyer. Vide Show. 158, 172. Farell. 148. 1 Sid. 65, 332. 1 Ro. 80. 2 Ro. 318.

3. 322, 323, 383.

Comyns 86. Ld. Raym.

41, 395.

1332, 1473. Prohibition if no Copy of Articles out of Spiritual Court. Ld. Raym. 991.

Domina Regina *versus* Browne.

HE was indicted at Hull for Forging a Cocket for quinq; Sarcinas Lini, Anglice Five Packs of Linen Cloth; and this was removed up by a Certiorari, and after Trial a Motion was made in Arrest of Judgment, for that it was too incertain; and that it was urged that much stronger Cases than this had been adjudged good, as 2 Lev. 125. duas Sarcinas Canabis, Anglice two Bundles of Hemp, 1 Lev. 303. for Parcel of Thread: Crover for Study of Books; for it is enough sufficiently to describe the Thing in which they were contained.

Motion to arrest Judgment for Incertainty of quinq; Sarcinae, &c. Ld. Raym. 133, 191.

Holt, C. Just. Detinue lies for a Box of Writings, and if any of them concern Lands, it will be prudent to name it, for that shall oust the Defendant of his Wager of Law; but it suffices that the Things which it contains be certain enough; and if any new Action be brought, Defendant shall say, That a former Action was brought for the same by the Name of so many Bundles, &c. and the Queen had Judgment.

It is sufficient if the Things containing be certain enough

Ld. Raym.
992. S. C.
1 Salk. 194.
S. C.

Garland *ver-*
fus Extend.
No Costs *pro*
Defendant if
he have Judg-
ment on De-
murrer to a
Plea in Abate-
ment.

Ante 84.

Post 198.

Wife indicted
by Husband,
admitted in

Forma Pauperis. Ld. Raym. 337. Caf. temp. W. 3. 195, 196, 523, 609. 2 Barnes 106, 112, 120. Caf. temp. Mac. 63, 335, 336. Stra. 1005, 1120, 1207, 1167, 1237, 1272.

Garden *versus* Exon.

PER Cur', There shall be no Costs for a Defendant upon Judgment upon Demurrer to a Plea in Abatement, for the Statute is to be intended of a Judgment upon Demurrer upon the Merits of the Case; for if there were Judgment of Respond' Ouster for Plaintiff, he should have no Costs: Ideo a pari; and the Case of Thoms and Lloyd was quoted, where the same had been resolved before.

A Feme Covert was indicted by her Husband for poisoning his Cows with bruised Glasse put in their Grains; and she was admitted in *Forma Pauperis*, though the Court said, The Husband could not convict her.

Where it is a
Contempt to
charge a Pri-
soner.

Per Cur', If a Person be in Execution for a Fine, it is a Contempt for any to charge him with a Civil Action without Leave of the Court; but the Court will hardly discharge the Action, though they will punish the Contempt.

If a Person is
likely to be-
come chargea-
ble to a Parish.
2 Salk. 491,
492, 514.

Per Cur', It is a good Cause in an Order of Sessions to say, That the Party is likely to become chargeable to the Parish, or that he does not rent a Tenement of 10 l. a Year; and they may remove any Man that does not rent 10 l. a Year let him be worth ever so much, for his having a Freehold of his own is foreign; and if he has any, it ought to come of his Side upon the Appeal.

Note; Under this last Head may be reduced several Cases lately adjudged, and which are now Reported in a Collection of Cases and Resolutions touching Poors Settlements and Removals, pag. 15, 24, 194, &c. viz.

1. Their being likely to become Chargeable must be in the Adjudication of the Order, and not in the Recital only, except so averred by the Justices. The Queen against the Inhabitants of Rockville, Trin. 12 Annæ.

2. It must be directly so averred, Therefore are likely to become Chargeable, as we are credibly informed, is ill. Great and Little Waltham, Easter 1711.

3. So whereas J. S. is likely to become Chargeable, not saying to what Parish, is ill. The Queen against the Inhabitants of Bradford, Trin. 1711.

4. Whereas J. S. intruded into Roydon, and was last legally Settled at Hoxden, is ill, it not being said he was likely to become Chargeable. Hill. 1712.

As to the Point of Renting 10 l. per Ann. See divers Cases in that Collection, viz. Rudwick and Cheddingford, Mich. 1710. The Parish of Farnham, in the same Term. The Parish of Sedgemore, Easter T. 1711. St. Saviour's Southwark, Mich. 1714, i. e. 1 Geo. So Northdibley, &c. Easter 11 W. 3. St. Mary Guilford & Cranley-Hill, 1721. St. Johns & Ampwell, Trin. & Mic. 1722.

D E

Termino Sancti Hill.

Anno 2 Annæ, in B. R.

Coram Holt, Chief Justice,
Powell, }
Powys, } *Justices.*
&
Gould, }

Domina Regina *versus* Guy.

Ld. Raym.
1008. S. C.

A Mandamus was directed to the Official of-----to swear in A. and B. Churchwardens of the Parish of-----To this a Return was, That they were not duly chosen; and now a Rule was made for a peremptory Mandamus, for he should have complied with the Writ as far as he could, and have sworn one of them, if the Truth were that one of them only had been duly chosen, or else have returned, that neither of them was chose. But it was objected, That this could not be done; for by the Custom of the Parish the Parson was to chuse one, and the Parishioners the other: And the Parishioners insisted on it, That they should chuse two, and did propose two, and the Official could not tell which of them two to swear.

Mandamus to swear in Church-wardens.
Vide Farell. 83.
1 Vent. 267.
Carth. 118.
Vide postea 97, 98.
Farr. 83.
Object. Upon Custom of the Parish.
Ld. Raym. 138.
Cas. temp.

W. 3. 9, 116. Cas. temp. An. 221. Cas. temp. Mac. 12, 22, 23. 1 Mod. Cas. in L. & Eq. 338, 339, 380. Stra. 52, 609, 686, 1246.

Holt, Ch. J. Then you should have made a special Return, That the Parish claims a Right to chuse two, and that these Persons had an equal Number of Voices, that the Parson had chose his Man, and so you could not swear either of the Parishioners Men; or if the Parish unanimously chose two jointly, when in Truth they had a Right but to chuse one, that would be void as to both; and in that Case you might return generally, That neither of them had been chosen; and so where two have an equal Number of Votes. And at last, by Direction of the Court, it was consented to, to try the Custom in a feigned Action.

What Return ought to have been made.

Vide 2 Salk. 431, 432, 434, &c.

A a

— *versus* —

Vide ante 30.
Post 114,
169, 178.

Upon Justices
of Peace false
returning In-
quisition, and
the Affidavits
thereof.

— *versus* Cowper, a Justice of Peace.

AN Inquisition of Forcible Entry was removed hither by Cer-
tiorari, commanding the Justices to send all Inquisitions of
Forcible Entries made upon J. S. and the Justices returned an
Inquisition of an Entry made by B. upon J. S. and now Affidavits
were offered to give the Court Satisfaction, That the only In-
quisition before the Justices was an Inquisition of a Force by A.
and that the Precept was, to summon a Jury to inquire of a
Force against J. S. by A. and that they did not inquire of any
other Force.

How to be
heard, &c.

Action lies.

Per Cur'. We cannot hear Affidavits against the Return, which
is Matter of Record, in order to make Restitution, but we may
do it in order to have an Information filed against the Justices for
this Abuse: Or, if the Return be false, you may have your Action
of False Return. And here Day was given to shew Cause why
an Information should not be filed against them.

Vide antea.

Holt, Ch. J. took this Exception to the Inquisition, That it
alleged the Party to be seised in Fee of a customary Estate ad
Voluntatem Domini, but did not say dimiss' & dimissibil'.

Post 266. S. C.

Garibaldo *versus* Cagnoni.

Arresting one
going from
Court.

Vide 1 Vent.

11.

2 Mod. 181.

Post 96, 173.

Comyns 411.

1 Barnes 17,

137, 138,

278.

Stra. 986,

1094.

G. Came to Court to confess an Indictment for an Assault upon
C. and as he was going home, C. gets him arrested for
the same Assault; and upon Motion and Affidavit of this Matter,
an Attachment Nisi was granted against him, and before the Day
he discharges G. and now coming to shew Cause, the Rule was
set aside, because the Affidavit did not charge him to have Notice
that G. came to Court to confess the Judgment, for otherwise he
could not be in Contempt for the Arrest.

— *versus* Catchmade.

1 Sid. 464. a.

Hob. 617.

Vide 1 Vent.

65, 73.

1 Inst. 118. a.

Per Cur'. **I**f a Contract be for four Pounds, and a Plaintiff, to
give an Inferior Court Jurisdiction, will split it into
several Actions, a Prohibition shall go.

Domina

Domina Regina *versus* Corbett.

Post 204.

THE Justices of Peace made an Order upon the Defendant, that he should pay B. so much Money for Labour and Work done, without so much as saying that he was his Servant; and it was quashed: For, per Cur', this might be Carpenter's Work, &c. and the Justices have only Power in Cases of Wages of Statutable Servants, viz. Servants in Husbandry, and they would be very tender of quashing such Orders.

Justices of Peace, their Authority concerning Wages. Vide 1 Salk. 406. 2 Salk. 475, 680. Caf. temp.

Mac. 68. Ld. Raym. 820, 1305. Stra. 8, 1002.

Sutton's Case.

Ld. Raym. 1002. S. C. Ante 57. S. C. Vid. 1 Salk. 2. Farell. 50. Dyer 114, 115. Marshal turned out for Non attendance, and new Marshal gets Possession by Force.

HE had been Marshal of the Court, and for Non-attendance another was sworn into his Place, but (as the Court declared) without Prejudice to his Right to the Office, for that was left to the Law. Now the new Marshal, to get Possession, makes a forcible Entry into the Prison; and Brotherick moved in Behalf of Sutton, that the Court, in regard of the Power they had over their Officer, would interpose, and quiet the Possession 'till the Title were legally settled; and the rather, for that it would look disrespectful in him to apply to an inferior Jurisdiction to have an Inquisition of forcible Entry, and that the Justices would hardly dare to meddle in it, by reason of its immediate Dependence on the Court: And tho' a new Marshal were sworn in, yet the former was liable to all Escapes of Prisoners charged in his Custody, and doubtless they would be many in this Disorder.

Cur'. It cannot be disrespectful to us, that any should use the Remedy the Law gives him. And here you would have us hold Plea of forcible Entry by Parol, whereas the Court has no original Jurisdiction of forcible Entry: Et currat Lex, for it is a Question of Right between two contending Officers; and as to the Inconveniency of Escapes, the Court said, that he was so used to suffer voluntary Escapes, that they could not imagine he feared any Danger that May. Vide Farell's Rep. 50.

He feared no Escapes.

Jenkins & Ux' *versus* Plombe. *Vid. postea* 181.

1 Salk. 207. S. C.

INdebit' by Husband and Wife Executrix, declaring, quod cum the Defendant was indebted to them ut Executor of J. S. for so much Money received by him to their Use as Executor, he promised to pay it, &c. Non assumpsit, And at Trial the Plaintiffs were non-suited, and the Question was, Whether they should pay Costs upon the Statute of 23 H. 8. And per Darnell, Serjeant, They shall; for this Action is brought by them in their own Right, and upon a Contract

Wife Executrix, and Husband and Wife declare as Executors, *sur Indebit' assumpsit.* If upon Non-suit, they shall pay Costs. Ld. Raym.

4 Mod. 244.
Vid. 1 Infl.
241.

traff with themselves, viz. the Receipt of the Money to their Use, and in which they ought not, at least need not, name themselves Executors; and the naming the Plaintiff Executor when it is not of Necessity, shall not exempt him from paying Costs. Vid. Latch 220. Hutt. 78, 79. And for a Foundation to this Distinction, he relied on the Book of 2 H. 7. 15. where the Difference is taken between an Action brought upon the Executors own Possession, and where upon the Possession of his Testator; and upon this he would reconcile the Cases in 3 Lev. 60, 375. 2 Lev. 165. If Executor bring Trover for Trover and Conversion in the Time of his Testator, or upon Trover in Time of Testator, and Conversion in his own Time, he shall not pay Costs: So upon an Insimul computasset with the Executor for Debt due to the Testator the Executor shall not pay Costs.

If the Receipt
was since the
Testator's
Death, &c.

Vide postea.

If to be
looked upon
as a new
Debt.

1 Vent. 109,
110.

Trover upon
Executor's
own Posses-
sion, he shall
pay Costs.

Vid. Sir Tho.
Jones 170.

Action upon
Account with
Executor.

1 Vent. 109,
110.
Costs upon
Assets, &c.

Holt, Ch. J. If the Receipt were since the Testator's Death, and by Appointment or Consent of the Executor, there the Action must have been brought by him, not as an Executor; for the Receipt by his Appointment is a Receipt by himself. Then if the Receipt be without the Executor's previous Appointment, yet the bringing this Action is an Assent to the Receipt, and makes it a Receipt in his own Right: So that in either Case the Debt ought to be looked upon as a new Debt, contracted since the Death of the Testator. And this Receipt must be intended to have been in the Executor's own Time, because the Receipt is laid to have been to the Executor's Use; and he concluded that there was no Room for the Executor here to declare as Executor: If there be a Receipt by Appointment of Executor, it is immediate Assets in the Executor's Hands, and by bringing this Action, it is in the same Manner. And if Executor or Administrator bring Trover upon their own Possession, they shall pay Costs. Yet there, if Administrator had called himself Administrator, and it is so entered on Record, and has Judgment, and after Administration is repealed, the Defendant would be relieved by Audita Querela, because it would appear on the Face of the Declaration that he had been sued under that now repealed Administration. And the naming himself Executor here is not of Necessity, any farther than to shew how the original Right came. If Executor account with the Testator's Debtor, indeed thereby a new Action accrues, but still it is in the Right of the Testator, and no new Contract is made, but only an Ascertaining of what was due before. If Judgment and Execution be in the Testator's Life, and Escape in Executor's Time, upon a Nonsuit in Action by the Executor for this Escape, he shall not pay Costs; but if he had Judgment and Execution in his own Time, and an Escape had happened, for which he brings an Action and is nonsuited, he shall pay Costs.

Powell. Where the Thing sued for is Assets in the Executors or Administrators before Recovery, there they shall pay Costs upon the Nonsuit: Or when the entire Cause of Action arises in his own Time. And it was agreed to have been adjudged, that for Rent accruing in
Executor's

Executoꝝ's own Time, the Executors nonsuited should pay Costs; as also that in Covenant with Testatoꝝ, and Breach in Time of Executoꝝ, should pay Costs. Quære per me, If there be any Difference upon this Account, between Covenant for Rent upon Covenant made with Testatoꝝ, and Debt for Rent upon a Lease with him?

Vide Hob.
283.

And it was agreed by the whole Court, That the Statute, by the Words thereof, does not distinguish the Case of an Executoꝝ from any other Case; but it was by an equitable Construction resolved so by the Judges for this Reason, Because the Nature of Cause of Action does not lie in their Privity or Knowledge.

That the Statute does not distinguish the Case.

And Holt, Ch. J. said, That it has been held, that if the Plaintiff's Declaration were so bad, that the Plaintiff, in case he obtained a Verdict, could not have Judgment, there, if he were nonsuit, he should pay no Costs; and therefore this Action being by Husband and Wife upon the Possession of the Husband only, so that if there had been a Verdict, he could not have Judgment, therefore he could have no Costs: But he said, the contrary had been resolved. 1 Cro. 175. Hob. 219, 284.

If the Plaintiff could not have Judgment after Verdict.

And the Case being moved again to Day, and the Case of Elwis & Mocato in this Court, Pasch. 2 Annæ, was quoted for the Plaintiff, which was several Counts by a Plaintiff Executoꝝ, one whereof was an Infimus computasset, and being nonsuited, per Cur', paid no Costs; which Case was now again agreed, because there was no new Cause of Action, but a new Action upon an Ascertaining of an antient Cause, which Ascertaining leaves it still a Debt of the Testatoꝝ's.

1 Salk. 314.
Farell. 48.
Vide Hob.
80.

No Costs where no new Cause of Action.

And it was agreed now by the Court, That the Case of 2 H. 7. 15. was a good Foundation for this Case; for there it is agreed, That Feme Executrix cannot give the Goods of her Testatoꝝ away without Consent of the Husband, and if he consents to it, then it is he that gives it, so the Wife here cannot appoint one to receive this Money, but if he consents, then it is his Appointment.

If Husband consents to the Wife's Appointment.

And if an Executoꝝ appoint another to receive a Debt of his Testatoꝝ, and he receive it, it is now the same Thing as if he had actually received it himself, and then it would be Assets in his Hands, and by Consequence appointing another to receive who will not repay, is a Devastavit.

And Holt, Ch. J. strongly inclined, That the bringing of this Action was such a subsequent Agreement as would make it Assets in his Hands from that Time, by the Rule of Omnis Ratihabitio, &c. But he agreed no more would be Assets in his Hands than he recovered, and not as much as was received or declared for, and even for that he would not be liable till after Judgment, but immediately after Judgment, and before Execution, he is liable: Whereas where one sues as Executoꝝ, tho' he has Judgment, yet till Execution, the Thing recovered is not Assets in his Hands. And as if the Husband had actually appointed the Defendant to receive, he alone ought to bring the Action in his own Name; so here the Ratihabitio amounting to an Appointment, he ought to bring it alone: As if a Man

enter into my Land, and take the Profits thereof, I may, if I please, charge him in Account as my Bailiff, though there never was any Privy between us till the Action brought.

And where it was objected, That if the bringing the Action should amount to an Appointment, then by bringing the Action, the whole would be Assets in his Hands before any Recovery.

Nonfuit sets
the Matter at
large again,
&c.

Vide Hob.
36.

Vide postea.
A Devastavit.

2 Lev. 189.

3 Keb. 597,
615, &c.

He answered, That would not follow; for they being nonsuit, the Matter is set at large again, and he has Liberty to sue the original Debtor; but if he had Judgment, and no Execution, or ever like to have any, yet his bringing the Action, and having Judgment, would discharge the first Debtor, and by Consequence be a Devastavit in him; for by the Judgment he makes the Defendant his Debtor, who never owed any Thing to the Testator.

And he quoted the Case of Norden and Levit, Anno 77. which was this: Executor brings Trover for a Conversion in the Life of his Testator, and the Party being arrested and insolvent, he takes a Covenant from him for the Payment of so much Money in Satisfaction: And it was held, That forasmuch as this did extinguish the original Cause of Action, it was an immediate Devastavit, which Judgment was affirmed by the House of Lords; a fortiori would it be in our Case, the extinguishing of the Original Debt by Judgment against the present Defendant would be a Devastavit, and upon Judgment, not the Administrator de Bonis non, but the Administrator of the Executor, should sue Execution.

Costs to be
paid upon
Nonsuit.

1 Vent. 119.
Hob. 288.
contra.
Post 181.

If Executor lose the Testator's Goods out of his Possession, and declares that he was possessed of so much Goods as Executor to J. S. and upon the Evidence it appears that they were his own proper Goods, he shall be nonsuited, and pay Costs. Vide Hutt. 214, 220.

Where Relief
is by Audita
Querela.

1 Mod. 62.

2 Saund. 148.

3 Keb. 668.

If one as Administrator bring Trover upon his own Possession, and is nonsuited, he is condemned in Costs: After Administration is revoked, he shall by Audita Querela be relieved against the Costs.

And this was the Case of Turner *versus* Davis, 16 Car. 2.

And it was laid down for a Rule, That where an Executor brings an Action in which he need not name himself Executor, there if he be nonsuit he shall pay Cost. 2 Cro. 361, 229.

But Powell and Gould seemed contra, for this was an Action to make Assets, and not for the Recovery of what is so already; and immediately after the Receipt, there was no Assets accrued to the Executor.

If no Assets,
no Costs.

Vid. Hutt.

78.

Latch 220.

2 Cro. 229,

350, 361.

Cro. El. 403.

Vide 3 Lev.

60.

1 Vent. 109,

110. contra.

But Holt, Ch. J. said, That in the Case in Cro. Car. 29. reported to be Three against One, as it is in Hutton, is Two to Two: However, he was of Opinion there ought to be no Costs, for the Ward never came to the actual Possession of the Executor, and could not therefore be Assets in him; as if Testator's Goods be taken and converted after Death of Testator, before they come to the actual Possession of the Executor, they are not Assets; and therefore if he be nonsuit in Trover for them, it were hard to make him pay Costs. Et adjournatur.

Domina Regina *versus* Watton.

IN the Caption of an Inquisition of Forcible Entry, it was said, Juratores jurat' & onerat' super Sacramentum suum, &c. And to this Brotherick excepted, for that it does not appear what the Jury were sworn to do, whether they were an Inquest of Inquiry, or a Petit Jury: And tho' it might not be necessary to say, That it was Ad Inquirendum pro Corpore Com': yet at least it ought to appear that they were an Inquest: And the Court ordered Precedents to be search'd.

Motion to quash an Inquisition of Forcible Entry for Want of Words *Ad Inquirend'*.
Vide 1 Salk. 260, 261, 353.
2 Salk. 450.

1 Mod. Caf. in L. & Eq. 65. Ld. Raym. 215, 548, 1710.

And Harcourt, at another Day, inform'd the Court, That most Inquisitions in King Charles II.'s Time that wanted these Words, Ad Inquirendum, were quashed.

To which Holt, Ch. J. answered, That he had known Inquisitions quashed for it; but since it was a particular Offence, and at the Suit of the Party by the Statute, by his Consent none should ever be quashed for it; and in no Indictment is it ever said what the Jury is to enquire of, but only, Ad inquirend' pro Dna' Reg' pro Corpore Com. And as to the Want of the Words, Ad inquirend', in Case of Petit Jury, you only say, Elect. triat' & jurat', without saying, Ad triandum Exitum: And here it is said, Jurat' & onerat' dicunt super Sacr', and it does appear that they were sworn to present, because there is no Issue joined; and the Reason why in Presentment at the General Quarter-Sessions it is necessary to say, Ad inquirendum pro, &c. is because their Commission is such, and the Jury must enquire according to the Commission; but here their Commission is by a Statute: And if it were an Indictment for Riot upon the Statute of H. 4. it might perhaps be held well, without the Word Inquirend'. And the Inquisition was confirmed per Cur'.

That this is a particular Offence at Suit of the Party, &c.

Inquisition confirmed.

Parker *versus* Sir William More.

HE was taken up upon a Judge's Warrant, for escaping out of Prison, on a Sunday; and the Question was, Whether this being on a Sunday were such Service of Process as was against the Act of 29 Car. 2. c. 7? And though the Court of Common Pleas conceived it was, and had discharged some for that Reason; yet now the whole Court of King's Bench held this Taking to be in the Nature of a fresh Pursuit, that is, a further Force and Means added to a fresh Pursuit by the Act; and it is no original Process; for a Commitment upon it is but the old Commitment continued down, and the Gaoler or Party might have taken him upon a fresh Pursuit upon a Sunday before this Statute. And Holt, Ch. J. besides said, That if the Court relieve him, it must be by Audita Querela; for it being on Sunday, is a Fact traversable. But ceteri, If there were no more in it, we would do it upon Motion, but would not relieve in this Case.

Note; On an Escape out of either Counter, the Action must be against both the Sheriffs of London. Carth. 145.

2 Salk. 626. S. C.

Ld. Raym. 1028. S. C.

Vide 5 Mod. 95, 450.

That a retaking an Escaper on a Sunday by Judge's Warrant is lawful.

Vide ante 21, 22, 63.

Post 96, 154, 254.

Caf. temp. W. 3. 275.

348, 606, 607, 667.

1 Mod. Caf. in L. & Eq.

21. Stra. 387.

Lidford

Vide 1 Salk.
8.

Lidford *versus* Thomas.

Motion to
discharge one
arrested on a
Sunday with-
out Warrant,
&c.

Q. 2 Keb.
777, 838.
1 Mod. 56.
Ld. Raym.
396.
False Impri-
sonment.
1 Mod. 56.
Hutl. 19.
5 Mod. 95.

Arrest.
Vid. post 173.
Ante 90.

EYre moved to have the Defendant discharged out of Custody, for that he had been arrested on a Sunday by Process out of this Court; but in Truth it appeared that he was taken without any Warrant on a Sunday, and kept lock'd up till Monday Morning, and then a Writ was got.

Per Cur'. If you were imprisoned without a Warrant, you have your Remedy by False Imprisonment; but then let them shew Cause why Attachment should not go against them. And it was said by Gould, That Attachments have gone frequently in such a Case; and so was the Rule here.

Holt, Ch. J. said, That after Arrest the Bailiff ought to carry the Party to the next Gaol, if he does not desire to be carried to a Place for to send for his Friends.

Vide 1 Salk.
75, 380.
5 Mod. 96.
1 Keb. 933.
Officers in-
dictable.

Per Cur'. If a Man be made an Officer by Act of Parliament, and misbehave himself in his Office, he is indictable for it at Common Law, and any publick Officer is indictable for a Misbehaviour in his Office.

1 Salk. 181.
S. C.

Domina Regina *versus* Dyer.

Vide ante 41.
Exception to
an Indictment
of Entry for
not saying
Manu forti.
Ld. Raym.
610.
Caf. temp.
An. 235.

AN Exception to an Indictment for an Entry into Land was, That it was not said to have been *Manu forti*, as the Words of the Statute are. But per Cur', At Common Law one was indictable for entering into Land whereinto his Entry was not lawful, tho' there was no Force; but Statute forbids Force in entering or detaining, even where Entry is lawful: And here they would not quash the Indictment.

Vide ante 86.

Horner *versus* Bonner.

Tithes.
If Prohibition
for barren
Ground.
Ante 86.
2 Ld. Raym.
991.

Suit was for Tithes: A Prohibition was moved for, suggesting the Land to have been barren Ground cultivated, and therefore ought to be exempted so long, &c.

Cur'. If Land yield any Profit before, as Wood, &c. it is not within the Statute; for it ought to be *suapte Natura sterilis*. Of Tithes of barren Cattle, see Skin. 560, 561. See also *ibid.* 51, 239, 341, 356. Carth. 70, 143, 264, 304, 392, &c. 3

Domina

Domina Regina *versus* Paroch' de Littleport.

2 Salk. 531.
S. C.
Vide ib. 525.
Ld. Raym.

TAwney some Years before had been Overseer of the Poor of that Parish, and had disbursed several Sums of his own Money for the Relief of the Poor before any Rate made: After, and before the End of his Year, he was turned out by the Justices of Peace, whereby he lost the Opportunity of reimbursing himself what he had advanced out of the Poor's Money. And now a Mandamus was directed to the Churchwardens, Overseers, &c. to make a Rate for reimbursing him what he had been out of Pocket on Account of the Poor. To which they returned, That the Parish did never agree to his Disbursements, and that his Accounts were not allowed by the Justices of Peace.

1009. S. C.
Mandamus for
reimbursing
an Overseer
turned out.
Vid. Ante 97.
Carth. 118,
393, 450,
160, 362.
Stra. 42, 93,
211, 63, 1259,
512, 1004,
1071, 1123,
1261.

Eyre, for the Parish. 1. This Writ does not lie in this Case; but it should be, 1st, To the Justices of Peace to settle his Accounts. If such a Writ lies in this Case.

2. Tho' it be usual for Overseers thus to advance Money, yet the Law gives them no Remedy to come at it again; for the Statute does not enable them to charge the Parish with any Debt, but he is first to raise the Money, and then to employ it. And a Constable was bound to give Money for the Removal of Uagrants, and so were Surveyors of Highways under a Necessity of advancing Money, yet they had no Remedy for it till 14 Car. 1. and W. & M.

3. If there had been any Remedy, it should have been against the immediate Successor; for you will not suffer an Examination upon a forcible Entry after three Years Time, as was adjudged in Harris's Case. What Remedy, against whom, and when.

4. The Writ ought to have fixed them to a Sum certain, and not to have left it to the Discretion of the Overseers and Tawney. Vid. last Term, Queen *versus* Chafey. Vide ante 77, 87.

Wells contra. When the Overseers have advanced Money for the Relief of the Poor, now they become in the Stead of the Poor a Charge for so much to the Parish; and in case of a Bastard-Child, they shall be allowed what they have laid out to the Midwife, or Maintenance of the Child, before any Order made. And the Cases objected, where a Law was said to have been made on Purpose for Reimbursement, they are nothing like this; for here the Parish is by the Law chargeable to the Relief of the Poor, but there it was not chargeable by any Means. Argument pro Remedy.

Holt, Ch. J. The Question is, How the Law stands? The Statute appoints a Method for the Relief of the Poor, viz. That the Churchwardens and Overseers, and such Inhabitants as they shall call to them, shall make a Rate: But here the Officer begins the wrong Way, that is, advances Money without any Rate made; and this is the Way to oppress the Parish with two great a Charge: And if any sudden Charge comes after a Rate made, there ought to be a

Econtra, That the Officer begun the wrong Way.

How the Order for a Rate ought to have been, and how to account.

Vide 2 Salk.

525, 531, 533.

1 Wms. 670.

Ld. Raym.

798.

Caf. temp. W. 3. 251, 212, 327, 559. Caf. temp. An. 222, &c. 259. Caf. temp. Mac. 104. 1 Mod. Caf. in L. & Eq. 338, 339. Stra. 983, 992.

new Rate made for that, tho' I do not say but a Rate may be made after the Poor are relieved; but then the Order ought to be for levying the Money for the Poor, and not for the Overseer, tho' it is reasonable the Overseer should thereout satisfy himself for what he before laid out; but still the Overseers must account with the Justices for what they have received, and what laid out: And this is not like the Case of a Bastard Child, for there is no Method of raising, or of laying the Money out in that Case as is here.

Mandamus if the Justices refuse to approve the Rate.

Rates when to be made.

Powell accord. I would help you if I could; it is true, there may be such an Exigency as would not admit of the Delay of a Rate; and there the Overseer may advance, and ought to have a Rate in convenient Time, and have it approved as it ought by the Justices; and if they refused to approve, there a Mandamus had been proper: But still that Rate ought to be a Poor's Rate, and not to reimburse himself, but that is his own Business, when he gets the Money: But the Overseer is obliged to advance no Money till the Rates be made and the Money raised; and by the Statute a Rate ought to be made once a Month.

Obj. If Necessity be not in the Case; and if the Sum levied ought to be certain.

Now this Term it was urged, That by the Statute of 43 Eliz. by which Overseers of the Poor are appointed, he is to be chose yearly at Easter; and immediately before any Rate can be made, here will be a Necessity for Money; for Justices of Peace make Orders upon Overseers to relieve such a Person without taking Notice whether there be Money or not, and Indisputably have been frequent for disobeying such Orders: And Dalton's Justice of Peace was quoted, where it is said, an Order of Sessions for refunding an Overseer had been allowed of: And as to the Objection, That it is not to levy any Sum certain, it could not be otherwise; for if a Mandamus were to levy 30l. and but 20l. due, it would be a good Return to say, That there was not 30l. due: Quod Holt negavit, & vid. ant. Queen versus Guy, pag. 89.

Resp. That Overseers need not advance their own Money. See Carthew 160, 362.

Holt, Ch. J. Overseer need not advance a Farthing of his own Money, for the Church-wardens and Overseers of the Poor may make a Rate whether the Parish will or not, so it be confirmed by Justices of the Peace; and if any refuse to pay such Rate, it may be levied by Distress, and there ought to be a Monthly Rate, because Possessors are to pay, and Possessions frequently change.

The Writ quashed.

And per tot' Cur', the Writ of Mandamus was quashed. See the Cases touching Mandamus's in Carthew 92, 118, 168, 170, 173, 226, 293, 393, 417, 448, 450, 457, &c. And Skinner 64, 290, 293, 310, 368, 546, &c. 669, &c.

Domina

Domina Regina *versus* Daniell.

HE was indicted, for that he quendam R. S. Servant and Apprentice of one B. of London, a Shopa & Domo, & a Servitio præd' B. discedere & seipsum absentare procuravit allexit persuasit & causavit.

1 Salk. 380.
S. C.
Post 182, 289.
Pop. 132.
2 Roll. Ab. 75.
Noy 105.
Ld. Raym.

1116.
Indictment for
persuading
and causing an
Apprentice to
leave his
Service.

Brotherick excepted, That there was no Averment, that the Servant had left the Service; and tho' in some Cases, if one advise or persuade another to an ill Thing, if the Thing be done in pursuance of such Advice, the Advisor shall share in the Offence; yet in no Case the bare giving Advice, or endeavouring to persuade one to do an ill Thing without more, is punishable: But he agreed, That if several conspire and confederate together to do an ill Thing, though nothing more be done, it will be indictable, because the Meeting together in order to such Confederacy is unlawful: Vide Poph. 134. Vaughan's Case. 2 Roll. Abr. 75. 4. And all that is charged here might be, for prevailing with this Servant to go with him to the next Door to drink a Pot of Ale. 11 Co. 98. If a Freeman of a Corporation or Borough does endeavour, intend or conspire, with others, to do an Act that tends to the Prejudice of the Corporation; yet if there be no Act done, it is no good Cause of Disfranchisement, nor of Indictment; a fortiori, it will not be a good Cause here, where the Endeavour is only to the Prejudice of a single Person in one particular Instance: And the Rule is, Non officit affectus nisi sequatur effectus. See 11 Co. 98. Even in a Conspiracy there must be something done in pursuance of it. And the strongest Case of this Kind was the Case of the K. v. Starling; Indictment for meeting and conspiring together how to impoverish the Farmers of the Excise; but the Reason why that was held indictable was, because such a Thing would affect the publick Revenue; and if the Conspiracy were, that none should buy Coffee from B. and no more done, it would not bear an Indictment: So if Confederacy were to way-lay a Man, and kill him, or rob him.

1 Exception,
That here's
no Averment
of leaving his
Service.

In Conspiracy.

See 11 Co. 98.
b. Bagg's Case,
& 1 Ro. R. 226.

But Holt, Ch. J. denied the two last Instances.

2d Exception was, That it was not said how long he had withdrawn, in case any Absenting or Withdrawing be understood, which ought not to be; for whatever is essentially necessary to maintain an Indictment, must be directly and clearly charged, and not only by Inference.

2. Not said for
what Time.

King contra. The Words, Causing, Procuring, &c. are very strong, and necessarily import a Withdrawing; and he quoted a Precedent of this Kind out of Rastal. tit. Indictment: And sure this is a Matter indictable, for it breaks that Trust that is between Master and Apprentice, with very ill Example, and publick Influence to all the Apprentices in England.

R. That it is
imported, and
the Matter in-
dictable.

Holt,

Ch. J. doubted whether it were an Offence indictable.

Vide ante 48, 55.
1 Vent. 206.
2 Vent. 25.

Bare advising to rob or kill, not indictable.

Time of Absence material.

Holt, Ch. Just. doubted whether it were an Offence indictable, because it was only a private Wrong to the Master; and that enticing, &c. a Man to do a Thing, did necessarily import, that the Thing was done; and the Case of Starling was directly of a publick Nature, and levelled at the Government; and the Gift of the Offence was its Influence on the Publick, and not the Conspiracy, for that must be put in Execution before it is a Conspiracy: If two or three confederate and agree to indict a Man of a Crime of which he is not guilty, that very Meeting and Agreement is an ill and unlawful Act, but not indictable perhaps; but if Meeting be to rob or kill, it may be indictable; but even there advising one to rob or kill, without something be done thereupon, is not indictable: And if a Man commit any Offence under Treason or Felony, and another desire him to withdraw from Justice, or do receive or harbour him in his House, &c. it is no Offence punishable, no more than it is to protect a Man in his House from Arrests in a Civil Action; and since you do not say for how long Time the Absence was, if there were no more in it, how can the Court apportion the Punishment to the Offence?

Post 137, 185.
Hob. 219.
Ld. Raym. 81.
377, 378, 380,
381, 1169.

Arg. That the Matter is indictable, and a total Withdrawing imported.

That bare Conspiracy was held indictable.

1 Sid. 68.
1 Lev. 62.
9 Co. 55.
Mo. 813.
Cro. Car. 15.
2 Bulst. 271.
1 Jo. 93.
Lat. 79.
Hard. 196.
If indictable, whether a Continuando ought not to be.

Holt, Ch. Just. agreed, A Conspiracy to charge one with a Bastard-child, is indictable; but if one should advise another to do it without more, it would not.

Powell. I thought this Matter indictable, because there are many Acts of Parliament concerning the Regulation of Apprentices and Servants, and that to run counter against any of those Acts, was Matter indictable; for it becomes a publick Concern, that they should be kept in good Order: If one prevail with a Wife to leave her Husband, he is indictable for it, tho' it be of no more publick Nature than this, because it is a Breach of the common Society of Mankind; and this tends to destroy the publick Trust and Confidence that ought to be between Master and Servant; and in respect whereof, the Law makes it a greater Crime in a Servant to kill his Master than in another, for it is Petit Treason in him, and only Murder in another: And he quoted the Poulterers Case, 9 Co. where bare Conspiracy without more was held indictable. Then let us see the Manner of laying it, and I think it is well enough, for the Case will lie for procuring a false Return, without alledging, that a false Return was made; and tho' there be no certain Time of Absence laid, it is discedere a Servitio, and that shall be a final and total Withdrawing.

Gould accord' with Powell in omnibus.

Brotherick. Every Violation of the law, every common Trespass, is in malum Exemplum, but not indictable; and as to the Continuance of Absence, if a Man lays a common Trespass done at such a Day, it shall not be intended to continue farther without a Continuando: Sure then it will be hard to intend an Offence laid in an Indictment to be committed at a certain Day, to continue longer than is expressly laid: And he said, That if at Common Law one had bound himself for a Year, and another had prevailed with him to ab-

sent

sent himself from that Service, Indictment would not lie for it: Indeed, if this were the Case of an Apprentice compellable to serve by Act of Parliament, it were the stronger against me; but for a bare Apprentice, that is only under an Obligation of his own making, it is very hard to maintain it.

Holt, Ch. Just. If a Servant for a Year, or at Will, kill his Master, it will be Petit Treason; and yet to intice such a Servant to leave his Master, would not be indictable: So that Reason fails, for the Reason why it is Petit Treason, is because of the Breach of Duty, and not of the continual Obligation of Service.

Where to intice a Servant, not indictable.

The Case was moved again this Term, and the whole Court unanimously resolved, that the Indictment was ill as to the Matter, for Want of an express Allegation, that the Servant did absent; for though a Cause cannot be without an Effect, and that it is said causavit him to leave his Service, yet in Indictments it ought to be expressly said, that the Effect did follow; and so it was in the Case of the Queen v. Tracy before: F. N. B. was quoted, That Trespass might lie for seducing a Servant; and the Court said, There might be a Difference between a Servant and an Apprentice, and they would not resolve if the Matter of this Indictment were sufficient or not; and Judgment arrested Nisi before the End of the Term. And the last Day of Term, Holt, Ch. Just. said, He was not satisfied, that to seduce one's Servant away was indictable, but to persuade him to embezzle his Master's Goods was; but then, whether it were necessary to alledge that he had embezzled them, for he said the Indictment might perhaps be for the evil Act of persuading.

Per Cur', The Indictment is ill for Want of an Express Allegation of Absenting. Vid. post 289. 1 Salk. 380. Vide ante 30. Post 114, 171. And Judgment arrested Nisi; but no Resolution as to the Matter.

But note; Here it was said, That the Servant did embezzle; but no Venue was laid, so Judgment was arrested.

Judgment arrested for want of a Venue.

Ireland's Case.

Raymond moved to bring Principal, Interest and Costs, into Court, and to be relieved against the Penalty.

Wherefore the whole Penalty of a Bond ought to be brought into Court.

Montague urged, That in this Case they would not relieve in Chancery, unless the Party Obligor would pay a Debt barrable by the Statute of Limitations; and insisted on the like Benefit here, this being an equitable Motion; but the Court would not hear of it, but made the common Rule.

Vide ante 11. 25, post 153.

Note; The whole Penalty must be brought into Court, because Interests and full Costs are to be taxed; and one may have the Remnant out immediately. Vide ante 11, 25, 60. Post 153. 2 Salk. 583, 596, 597. See the Stat. 4 & 5 Annæ c. 16.

Ld. Raym.
1016. S.C.
1 Salk. 3. S.C.
Intr. Trin.

Croffe versus Bilson.

2 Ann Rot. 146
In Replevin,
Plea in Bar,
With an *absq;*
hoc. Repl' to
an Issue, De-
mur to the
Repl'ic, and
concludes in
Abatement.
Judgment final
in C. B. for
the Plaintiff.

Error in B. R.

REplevin for taking his Hare in quodam Loco, vocat' The King's Highway: The Defendant Cognovit Captionem Damage-fe-
sant in quodam Loco, vocat' The Queen's Highway, as Bailiff to the
Lord L. whose Freehold the Place where, is, absque hoc that he
took Equam præd' in præd' Loco, vocat' The King's Highway; prout
the Plaintiff adversus eum narravit, & hoc paratus est verificare, unde
petit Judicium & Return' &c. Plaintiff comes and says, Quod cog-
noscere non debet, quia dicit quod dicto tempore quo, &c. cepit Equam
præd' in præd' Loco tunc vocat' The King's Highway, modo & forma
prout præd' Plaintiff allegavit, and hoc petit quod inquiretur per patriam.
The Defendant demurs, and concludes, Unde (ut prius) petit Judi-
cium, & quod Narratio præd' cassetur; Judgment final in Com' Banc'
for Plaintiff, and affirmed upon Error.

1. That all the
Matter of con-
sufance is wai-
ved by the *absq;*
hoc. &c.
Show. 169.
1 Salk. 3, 5,
93, 94.
2. That where
Matter of A-
batement is
pleaded in Bar,
&c. Judgment
final ought to
be.

2 Cro. 202,
253.
Show. 4.
Lut. 42.
1 Mod. 239.
1 Sid. 189.
Show. 155.

Judgment
affirmed.

Holt, Ch. Just. The whole Point of the Case, take it the strongest
that can be, is, after a Plea in Bar, and a Replication, the Defen-
dant demurs to the Replication, and concludes in Abatement, and
sure there Judgment final ought to be given; and they all agreed,
That all the Matter of Consufance in the Plea was waived by the
absque hoc; and the Consufance in a different Place from where the
Declaration lays the Taking, is in Truth Matter only proper in
Abatement; but the Conclusion turning it into an Avowry, makes it
a Plea in Bar, as all Avowries are, and final Judgment is always gi-
ven upon them, if they go for the Avowant. They also agreed, that
where Matter in Abatement is pleaded in Bar, and concluded in Bar,
Judgment final ought to be given. So where the Commencement
of a Demurrer is in Bar, though the Conclusion be in Abatement.
1 Lev. 312.

But it was objected, That the Demurrer being ill concluded, viz.
in Abatement, and contrary to the Bar, it was to be looked upon
as if there were no Conclusion at all, and it would be a Disconti-
nuance, and Judgment ought to be by Nil dicit.

To which the Court answered, that the Conclusion to the Demur-
rer was, Unde petit Judicium (ut prius) and that is well enough, and
according to the Conclusion of the Plea in Bar, and the subsequent
Words, and quod Narr' cassetur, being inconsistent, shall be rejected.

So per tot' Cur', the Judgment was affirmed.

If a Repleader
can be upon
a Demurrer.
Vide antea 2.
Vi Cart. 193.
and Note,
9 H. 6. 25. is
contrary to the
Record.
3 Lev. 20,
440.

Note; Here Powell positively said, That a Repleader could never be
upon Demurrer, but is always after Issue; tho' the old Books seemed
to make a Question of it, yet there were 20 Authorities in the new
Books of it: And yet Brotherick seemed as earnest of a contrary
Opinion at the Bar, tacente Holt, Ch. Just. & Cur' reliqua.
Also, No Repleader can be upon a Writ of Error. Vide 2 Keb.
769, 789, 825.

Note; In the Debate of this Case at the Bar, it was agreed, That the Matter of this Plea was Matter in Abatement, viz. a Variance in the Places.

That in this Case the Matter was Abatement, viz. a Variance. 1 Roll. Abr. 781. 3 Mod. 248.

2. That in Replevin the Defendant is both Actor and Defendant. As Defendant, he may abate the Plaintiff's Writ, and that were vain for him to do if he could not have a Return, and therefore he must proceed from his Plea in Abatement to make Conusance; for his Action being a Claim of Right to distrain, he ought to make Title to it against the Plaintiff in the Replevin who claims Property in the Distress.

Yet this Rule would be explained, viz. If the Defendant in Replevin claim Property in himself, he shall have Return without Conusance, because his Plea destroys the Plaintiff's Title: So if he lays Property in a Stranger, and make no Conusance, if that Matter be admitted by the Plaintiff, there shall be a Return without Conusance; for in that Case, by the Admittance, the Plaintiff's Property is destroyed. But in all Pleas that do not shew the Property out of the Plaintiff, there must be a Conusance made, and the Plea is what only is answerable, and not the Conusance; for to traverse that would be a Discontinuance. 8 Ed. 4. 41. b. Cro. El. 372. Mich. 2 W. & M. in B. R. Hall *versus* Foot, 1 Salk. 93. Vide ib. 94.

Where Defendant claims Property. Vide ante 69, 81. 1 Salk. 94. Vide 2 Lev. 92. 1 Vent. 127. 3 Cro. 896. 2 Cro. 519.

If a Man plead Matter in Bar, and conclude in Abatement, it shall be taken for a Plea in Bar from the Nature and Reason of the Thing; for the Plaintiff can have no Writ, if he has not a Cause of Action, and therefore the Court will take the Plea to be in Bar, 37 H. 6. 24. a. 36 H. 6. 24.

If Plea be in Bar, and concludes in Abatement. Show. 4. 155. 4 Cro. 202. 5 Mod. 130. 3 Keb. 181. Rep. 251.

Vide 1 Vent. 136. Fitz-G. 269, 270. Cal. temp. Mac. 112, 192, 210, 285. Gilb. Eq. 252, 253. Ld. Raym. 101, 337, 339, 593, 594, 1018, 1208. Stra. 1161, 1192, 523, 532.

If one pleads Matter of Abatement, and concludes in Bar, Et petit Judicium si Pl. Actionem habere debet, tho' he begin in Abatement, and the Matter be also in Abatement, yet the Conclusion being in Bar, makes it a Bar; and the Reason is, because you admit the Writ by concluding specially against the Action. 18 H. 6. 27. 32 H. 6. 17. b. 36 H. 6. 18. 22 H. 6. 53. b.

If the Plea be Matter of Abatement, and concludes in Bar. Show. 4. 155. 1 Lut. 34, 35.

And here Holt, Ch. J. said, That in Replevin if the Defendant will take Advantage of a Variance in the Place where the taking is laid, from that in which really it was, he must plead it in Abatement, and begin either Petit Judicium de Brevi, & de Narr', quia dicit the Cattle were taken in such a Place, absque hoc that they were taken in the Place in the Declaration. Then indeed he comes, Et pro Return. habendo distingly, he says, He avows the Taking in the Place mentioned in the Inducement of his Traverse, Damage-fesant, or for Rent, &c. To which no Answer is to be given, but all is to depend on the Plea in Abatement; and it is a proper Conclusion in Replevin to say, Unde petit Judicium & Return. Averior', without saying any Thing of Damages, for they are given by the Statute. Vide Stat. 17 Car 2. c. 7. 1 Salk. 205. 1 Sid. 380. 1 Lev. 255. 1 Vent. 40. Ray. 170.

How the Defendant in Replevin may take Advantage of a Variance. Vide post 157.

Conclusion.

2 Salk. 696.
S. C.

Ogden *versus* Turner.

To say one
stole a Deer,
without aver-
ring it tame,
not actionable.
Vide ante 23,
24.

CASE for these Words: There goes Ogden, who is one of those that stole my Lord S.'s Deer. Against this Action was offered, That Words spoke are not like Words in Deeds, for they are Fortius versus proferentem in Deeds, &c. but otherwise in Case of Action for them. Hob. 77. 1 Ro. Ab. 70 N° 50, 54. Not actionable to say that he stole a Deer, without averring it to be a tame one; or if that were averred, without alledging that he knew it to be a Tame one. And here it is not averred that a Deer was stolen from my Lord, as it ought; as if it be said, A. poisoned B. without averring him dead, not actionable.

Obj. It must
be understood
so or so, and
therefore acti-
onable.

Vid. 1 Vent. 4.
1 Sid. 396,
397, contra.

Contra. It was urged, that this must be understood of a tame Deer, of which Felony may be committed, and then without Question it will bear Action; or it will be understood of a Deer in a Park or Place where Deer are kept, and then it comes within the Punishment of the Statute of 3 & 4 W. & M. c. 10. against Deer-stealers, whereby they are to pay 30l. and Imprisonment, or Pillory and Imprisonment; therefore, quacunq; via data, the Action will lie. And the Case in 4 Co. was insisted on, that to say of a Woman, That she has a Bastard, is actionable; because it brings her within the Danger of the Statute of 18 El. Vid. 2 Sid. 7, 21. Palmer 298. 1 Ro. Ab. 37, 34, 38. 1 Cro. 436. and if the Defendant had indicted the Plaintiff here, after Acquittal he might maintain an Action for it.

1 Jo. 196.
1 Cro 140.

Yelv. 9.

2 Cro. 58, 59.
Yelv. 64.
2 Vent. 265.
Vide 1 Cro.
140.

1 Ro. Ab. 60.
1 Jo. 195.

Cur', Words which of themselves are actionable, without Regard to the Person, or foreign help, must either endanger the Party's Life, or subject him to infamous Punishment; and it is not enough that the Party may be fined and imprisoned, for if one be found guilty of any common Trespass, he shall be fined and imprisoned; yet none will say, that to say one has committed a Trespass will bear an Action; or at least, the Thing charged upon him must in it self be scandalous; and this here is, That he stole a Deer, which is *Feræ Naturæ*, ideo not scandalous. To say such a one burnt a Barn, without saying that it was Part of a Mansion-house, or had Corn in it, not actionable; and the Case of Sir Lionel Walden in 2 Vent. was carried too far, and happened in a dangerous Time, when the Kingdom in general were more furiously enraged against Popery; the Words were, L. W. is a Papist, and goes to Mass. And the Penalty by the Statute is a pecuniary one, and the Pillory is only for want of Money, so is not the direct Penalty given by the Statute. And besides, Holt, Ch. J. said, That Pillory upon this Account did not make the Person infamous, but he would remain a good Witness nevertheless. And to say, that one has hunted in a Park without Leave of the Owner, and killed a Deer there, which subjects him to the Penalty of the Statute de Malefactoribus in Parcibus, or to call a Man a Papist simply, would not bear an Action. And he said, That to say of a young

young Woman that she had a Bastard, is a very great Scandal, and for which, if he could, he would encourage an Admon; but it is not actionable, because it is a Spiritual Defamation, punishable in the Spiritual Court. So it is to call a Man a Heretick: And he denied the first Reason given in Anne Davis's Case, 4 Co. 17. a. Et per tot. Cur. Querens nil capiat per Billam.

Vide postea.
2 Sal. 696.

Quer. nil ca-
piat per Bil-
lam.

Note. Per Cur. If Feme Covert be arrested, and it be clear and notorious that she is covert, common Bail ought to be received; but if it be doubted, she ought to find special Bail.

When Bail
by Feme Co-
vert, ante 17.
Vide ante 42.

61. 1 Salk. 379. S. C. Post 304. Cas. temp. W. 3. 444, 445. 1 Barnes 59. 2 Barnes 74, 80, 167. Stra. 1167, 1237, 1272.

Anonymous.

A. Was indicted for deceptive coming to B. as sent from C. to whom B. owed Money, to call for and receive the Money; and receiving the Money, ubi revera C. never did send him.

Indictment
for coming
as sent by
another to

receive Money, &c. Ld. Raym. 1013. Cas. temp. An. 222.

Per Cur. If he had come with a false Token, it had been criminal, and ideo indictable; but the Question is, Whether this be such a Cheat as is indictable? As playing with false Dice is, for that is such a Cheat as a Person of an ordinary Capacity cannot discover; but this is an Indictment to punish one Man because another is a Fool. Per Cur. Let it stay.

Vid. 33 H.
8. c. 1.
Punishable by
any corporal
Punishment
except Death.

Anonymous.

Bailliffs broke a House to execute their Process, and the Court would not grant an Attachment, but bid the Party bring his Action of Trespass. Where the Bailiff may break open a House, &c. Vide Cro. El. 753, 908, 909. Cro. Car. 386, 544. Cro. Jac. 280, 486, 556. 5 Co. 91, 92, 93. 7 Co. 6, 126. 2 Co. 66. 1 Co. 82. 12 Co. 131. 4 Bulst. 146. Hob. 62, 263. 2 Rol. 294. Owen 63. Yelv. 28. Golds. 79, 233. 4 Leon. 41. 1 Rol. 18. 1 Jo. 429, 430. Cumberba. 17, 327, 342. Post 173, 210, 211. S. C. 1 Sal. 6. V. 1

Trespass lies
against Bai-
liffs for break-
ing a House,
&c.
Hard. 2.
Stile 447.
2 Co. 32, 33.
Moor 606.
Dyer 36.
Palm. 53.
Mod. 286.

Lett *versus* Mills.

The Defendant pleaded in Abatement, that Suscepit Ordinem Militarem, & jam Miles existit; and upon Demurrer it was resolved, That Suscepit Ordinem Militarem was a very proper Way of expressing that he had received the Order of Knighthood. Vid. Stat. de Militibus.

Ld. Raym.
1014. S. C.
Abatement
that he re-
ceived Order
of Knight-
hood; good.
Ld. Raym.
303, 509.
Cas. temp.
Mac. 284,
285.

2. Miles, without Addition, is to be understood of a Knight Bachelor, which is Part of a Man's Name.

3. That there needs no Venue where he was dubbed a Knight, because any thing that does concern the Condition of the Person shall be tried where the Action is laid.

4. That if a Knight be sued, and not so called, it is a good Plea in Abatement.

But it not being said that he was a Knight Tempore Exhibitionis Billæ, or after the last Continuance, the Court ordered a Respond' ouster. Post 306.

Ld. Raym.
303, 509.
Cas. temp.
Mac. 284,
285.
Stra. 316,
850.
1 Saund. 49.
V. 2 Saund. 8.
acc. 40, 41.
But a Re-
spond. ouster
for ill Plead-
ing.

Bill against
Attorney,
when to be
filed.
Post 114,
175.

Note; here it was said, That a Bill filed against an Attorney must be filed in full Term, and it is not enough it should be on any of the *Essoin-Days*. Of an Attorney's Privilege, see Carthew 57, 126, 147, 377, ante 26.

1 Salk. 236.
S. C.
Abr. Eq. 177.
S. C.

The Countess of *Bridgwater's* Case, *versus* his Grace the Duke of *Bolton*.

Ld. Raym.
968.
Special Ver-
dict upon a
feigned Issue
out of *Chan-*
cery.

Special Verdict upon a feigned Issue out of Chancery (Whether the late Duke of Bolton did by his Last Will devise certain Fee-Farm Rents to J. Earl of Bridgwater in Fee) found, That the said Duke, at the Time of his Death, was seised of several Lead and Coal Mines, and several Mills in the County of Westmorland, and of divers Fee-Farm Rents in Berkshire, and of divers other Lands and Tenements, and made his Will in hæc Verba:

Vide 3 Mod.
45, 228.
1 Lev. 212.
2 Vent. 285,
286.

Aleyn 28.

2 Danv. 527.

Ld. Raym.

187, 831,

1325.

1 Vern. 45,

65.

2 Vern. 690,

564, 461.

Cal. temp. Mac. 94,

151, 152.

2 Wms. 198.

3 Wms. 26, 56, 61, 91, 359, 295, 322.

Comyns 337.

Cal. temp. Talb. 110,

111, 157, &c. 284, &c.

1. He gives several Lands and Tenements to the Lord W. Pawlet, with Remainder to the first and every other Sons in Tail, &c. He further gives him 8000l. to be paid by his Executors. Then he gives to J. Earl of Bridgwater, his Son in Law, 5000l. and all his Mines which he held of the Earls of Burlington and Thanet, &c. And then comes the Clause in Question.

The Clause
in Question
as to the Re-
sidue of the
Estate.

Skinner 194,

562, &c.

Post 111.

1 Sal. 234,

236.

A Clause as

to Fee-Farm

Rents.

All which I give and devise to my said Son in Law J. Earl of *Bridgwater*, his Executors and Assigns, together with all my Plate and Jewels, and all other my Estate, real and personal, not otherwise disposed by this my Last Will, for to be given by him to his Children as he shall think convenient, I solely trusting to his Honour and Discretion, &c. that he will give them such Provision as will be necessary for them.

And another Clause was, Whereas I have contracted for the Sale of my Fee-Farm Rents, my Will is, That if my Debts shall not be satisfied out of my other Estate, my Executors (whereof the Earl was one) shall and may sell some Part or all of them for Payment of them, notwithstanding the Rents are not devised by this my Last Will.

This Case having been three several Times argued at the Bar, now the Chief Justice delivered the Opinion of the Court thus:

Four Things are considerable upon this Will.

1. If the Fee-
Farm Rents
pass by the
first general
Words.

1. Whether by this Clause, whereby the Residue of the Duke's Estate, both real and personal, is devised to the Earl of Bridgwater, the Fee-Farm Rents do pass by Virtue of the general Words, Residue of all my real and personal Estate, leaving out the Words, not otherwise disposed of, &c.

2. Suppose they do pass, Of what Estate? Whether in Fee or only for Life? 2. For what Estate.

3. To consider the Words, not otherwise disposed of, together with the former Words. 3, 4. The latter Words, and other scattered Words, to be considered.

4. Whether, considering other Clauses scattered in the Will compared with this, the Rents will thereby pass?

1. As to the first Matter, the Duke of Bolton, after several Dispositions in his Will, gives his Personal Estate to the Earl of Bridgwater, and then gives the Residue of his Estate, Real and Personal to him: Sure the Rents pass by the Word Estate, for that Word is sufficient to pass a Freehold as well as a Chattel. 1. That the Word Estate will pass a Freehold as well as a Chattel.

The Word Estate is a Genus Generalissimum, predicable of two Species that have their Difference, whereby they are divided, that is, Estate Real, and Estate Personal. 'Tis Genus generalissimum, predicable of two Species.

Estate Real is Genus subalternum, and has its Species too; that is, Estate Real in Fee, or for Life.

And so is Estate Personal in like Manner to be branched into Chattel real, and Chattel personal; and it has that Difference of a Chattel real, not because it is a real Estate, but because it has a real Extraction. A Man seised in Fee makes a Lease for Years, Lessee for Years has a Chattel real, because his Estate is derived out of a real Estate; but still it is not a real Estate, for it is a testamentary, and devisable by Will at Common Law by the Owner: So that if it were of Lands in Knight's Service, or in Capite, the Owner could not devise the Land for a Term; but if he had made a Lease for Years of it, then it became a Chattel in the Lessee, and consequently devisable. So that the Words Real Estate cannot be satisfied without a Freehold at the least pass, for a Chattel real is no real Estate. And this is no new Question; for Vid. 1 Ro. Ab. 854. Style 493. That the Word Estate comprehends both, viz. Freehold and Chattels real and personal, especially if the Words Real and Personal be added.

Obj. It is true, by a Devise of a Man's Estate real and personal a Freehold would pass, if these Words come not accompanied with other particular Words which express a Species of an inferior Nature, and which only can extend to a Chattel; and there the Generality of this Word, Estate, shall be restrained and explained by the precedent particular Words, according to the Rule in 2 Co. 46. 1 Saund. 160. 2 Saund. 411. and Abundance of other Books. Obj. Rule that the general Words shall be restrained, &c. by the precedent particular Words.

Answer.

R. True, but not where the subsequent general Words put a proper Difference, and take a higher Species than mentioned in the precedent Particulars.

Answer. The Rule is good and general, especially where the particular Words comprehend and express a Thing of an inferior Nature to the general Words subsequent; and that the general Words are put without their dividing Differences; for there indeed the Generality of them shall be controlled by the Bounds of the particular precedent Words: But where the general Words do put the proper Difference of Particulars, and besides, take a higher Species than the Particulars mentioned before, as in this Case it does by the Word Estate, which is a higher Word than mentioned in the precedent Particulars, and Real and Personal the proper Difference, there the general Words shall over-reach the Particulars before; as if in the Archbishop of Canterbury's Case in 2 Co. the Words had been, And all Ecclesiastical Persons of superiour or inferiour Rank, they would have taken in Archbishops, Bishops, &c. Vid. 1 Cro. 447. 1 Roll. Abr. 834. A Man seised in Fee of Lands, and of other Lands by Mortgage not forfeited, devises first all his Lands in Fee to A. and all the rest of his Goods, Chattels, Estates, Mortgages, Debts, &c. to C. It was held, That no Freehold pass'd, and very rightly; for there the Word Estate came with particular Words, without putting the due Difference as is done here.

Obj. That the Word *Residue* relates to the personal Estate before. Post 111.

R. It may relate to the Freehold before.

Vide Hob. 65.

Objection. The Word Residue is a Word of Relation, and therefore to be confined by its Relation to something given before: And whatever is before given is personal, therefore the Word Residue is to be understood of personal Estate.

Answer. 1. This Word Residue is not to be understood as only applicable to the next immediate Clause of Devise to the Earl of Bridgewater. 2. Suppose it were so, yet that would not hinder the Earl from taking an Estate of Freehold, for it must refer to all the other Clauses whereby an Estate is before given; and an Estate of Freehold is devised before, why then may not Residue relate to it? Suppose a Man devises the Manor of Dale to A. and the Heirs of his Body, and has other Lands, and devises the Residue of his Estate to J. S. and his Heirs, shall not both the Reversions pass, and relate to the first as well as the last, as also his other Lands? Therefore the Word Residue, if it must relate, must relate to Estate both real and personal. But for Argument sake, suppose it should only relate to a Thing of the same Kind that is devised to the Earl before in this Clause: A Man has an Estate consisting of two Parts, that is, real and personal, his personal Estate is as much Part of his general Estate as his real Estate is; and gives some, suppose by his Will, of his personal Estate away, and in the same Will gives the Residue of his Estate real and personal away, should not this pass the Freehold as well as the rest of his personal Estate? Sure there is no Doubt of it.

Obj. This Clause comes under an *una cum* with Chattels.

But Objection. This Clause is not only in company with a Clause that gives no more than a personal Estate, but also gives it to him, his Executors and Assigns; therefore coming with that Clause, [All which I give to the said Earl, his Executors and Assigns, together with

with my Plate and Jewels, and all the rest of my Estate real and personal;] so coming under an *una cum*, with Chattels, with the legal and proper Words of Limitation for Chattels, no more than a Chattel ought to pass by them.

Answer. Let us first consider how this Clause [Residue of all his real and personal Estate] is to be applied; whether we shall take it in an Accusative governed by the Verb [Do] or in the Ablative, by the *Una cum*: And I think it an Accusative, and not an Ablative, and that even in Latin it will be good Grammar so, in this Manner; *Omnia quæ do & lego J. C. B. una cum Gemmis & Argent': Et totum residuum Statûs mei realis & personalis*: And this is good Sense and Grammar, and consistent with the Meaning and Intent of the Testator. But suppose it be put in the Ablative, the Freehold in the Rents will pass; as if a Man has a real and personal Estate, and devises his personal Estate, *Una cum* his real Estate, the one and other pass as fully as if there were express Words of Devise or Grant to both of them: Hob. 174, 175. Mo. 880. Stukely & Butler's Case: A Man makes a Feoffment in Fee of the Manor of D. *una cum* the Manor of S. and makes *Livery secundum formam Chartæ*, both shall pass, though it be under an *una cum*: A Man is possessed of a Term for Years of such a House, and he devises his Term for Years *una cum* his House called B. which is Fee; they shall both pass; and there is no Difference between where Words are particular, and where they are general, if the general Words cannot be satisfied without passing the real Estate, as here they cannot.

R. It may well be governed as an Accusative by the Verb *Do*.

But suppose it be put in the Ablative, the Freehold will pass, and here the general Words cannot otherwise be satisfied.

2. In case a Freehold in the Rents do pass; Of what Estate, whether Fee, or for Life? And we all hold an Inheritance passes to the Earl of B. 1. If a Man be seised in Fee, and devises his Estate, the Inheritance shall pass without any other Circumstance to manifest his Intent, meerly by devising his Estate: Without this Construction the Words of the Will cannot stand; for the Word Estate implies a Fee-simple, for that is the general Estate that every Man is supposed to be seised of. 1 Inst. 9. Estate comes from *Stando*, because it is fix'd and permanent, and imports the absolute Property that a Man can have. It is true, an Estate for Life is an Estate, but it is with an Addition; and Estate in a Deed must be intended of an absolute Fee-simple; Ideo in a Will, &c.

If a Freehold passes, an Estate of Inheritance passes.

Estate implies a Fee simple, it comes from *Stando*, &c.

Most certainly in Grants it would not pass a Fee, because the Law appoints, that let the Intent of the Parties be ever so fully expressed and manifested in Grants, without the Word Heirs, a Fee shall not pass: Feoffment to J. S. to have to him in Fee-simple, which Words can have no other Sense than to pass an Inheritance, yet an Estate only for Life shall pass; and yet Fee-simple in Pleading is that which describes the Inheritance, as *seisitus in Dominico suo ut de Feodo*: But in a Will it is not so; and the Reason is, because a Will for Lands is a new Conveyance created by the Statute of 32 H. 8. c. 1. 7. 1. whereby a Man is enabled to devise all his *Socage-Land* at his Will and Pleasure: Now when a Man manifestly shews his Intent, that the Devisee should have the Inheritance, or a

In Grants it will not pass a Fee without the Word Heirs.

But otherwise in a Will.

greater Estate than for Life, the Statute that impowers him to devise his Estate at his Pleasure, shall make his Disposition good, without tying him up to the Forms of Common Law; and this is agreeable to the Common Law in Cases where Estates were devisable by Custom; for there express Words of Limitation are not necessary, for Devise of such Lands to a Man & Sanguini suo, passed an Estate Tail.

The Words are, *All my Estate*, and must be construed a Fee. 1 Sal. 234, 236. Cro. Car. 129, 293. 1 Jon. 195. Vide Hob. 75. See the Case of *Bertie and Faulkland* 3 Chan. Cases. And not a less Estate.

In the next Place, there are Words of Relation; it is not only the Estate, but my Estate: The Duke of B. was seised in Fee of these Rents, and he devises his Estate, that is, he gives that Estate that was his, and that must be construed a Fee; for if a Man asks the Question, What the Duke gives the Earl? The Answer is, his Estate: If it be ask'd, What Estate? It will be answer'd, Fee. Now to construe this to be only for Life or in Tail, would directly contradict the Testator's Words; for then an Estate for Life would not be the Duke's Estate, but a new and a less Estate; for it was an Estate in Fee, and you would have an Estate for Life pass, which would be a new Estate; and though there be no Difference between devising his Estate, and devising all his Estate, yet the Word [all] makes the Devise much more comprehensive; and if he gives all the Residue, he must give a Fee-simple, for an Estate for Life were not all; for every Estate in Fee consists both of Freehold and Inheritance, and therefore if he did not give the Fee, he did not give all.

That the Word *Estate* comprehends the Thing and Interest, &c.

Object. The Word Estate is understood not of the Interest which a Man has, but of the Thing itself: If a Man gives by Will all his Estate in such a House, then the Interest passes; but if he devises all his Estate without ascertaining in what, the Thing, and not the Interest, shall pass.

But I don't think so; for the Word Estate does in Truth comprehend the Thing and Interest; for it is impossible one should have the original Interest in a Thing, and not have the Thing itself, and still the Word in its properest Sense imports the Interest. Suppose I covenant with I. S. to convey him all the Covenantor's Estate in Middlesex, Covenantor makes him a Charter by Words of Grant of totum Stat. &c. Will any Man think the Covenant satisfied? No sure, for that obliges him to convey a Fee-simple; therefore if he will perform his Covenant, he must go in his Grant beyond the Words of the Covenant. We know in Pleading the Word Estate imports a Fee, as in a Formedon the Tenant pleads that J. S. was infeoffed with Warranty, *cujus Status* the Tenant has; that shall be understood of a Fee.

Estate in Pleading imports a Fee.

If the Devise had been of his Fee farm Rents, a Fee-simple would have pass'd.

But for another Reason this must be a Fee: And here I will quit the Word Estate, and suppose the Devise to be of his Fee-farm Rents; and so I hold a Fee-simple would pass as this Devise is, for this Reason: For the Earl is enjoined to make Provision for his younger Children out of the Estate devised to him. Suppose a Man seised of the Manor of Dale, devises it without any Limitation, to make Provision for J. S. in such Manner as he shall think convenient, and declares, that he leaves it intirely to him? Sure a very good Fee will pass

Vide Hob. 65.

pass, for in all Cases where Lands are devised to a particular Purpose, and that the Death of the Devisee may prevent that Purpose, there the Devisee will have Fee; and that is Collier's Case in Co. 6. And if here the Duke had appointed a certain Sum to be paid, it had been within the express Words of Collier's Case; but though that be not done, yet here is a Trust reposed in him; and how can he discharge that Trust if he has only an Estate for Life? Devise to a Man to dispose at Will and Pleasure, is a Fee, Latch 144. and this is to dispose as he pleases. Mo. 57. Pl. 165. Devise of Land to his Wife to dispose thereof upon her self and her Children; held that she had Fee subject to a particular Trust for the Children.

Rule of a Devise to a particular Purpose.
6 Co. 16.
Cro. El. 378.
3 Chan. Reports 102, 103, &c.
And here is a Trust reposed.

3. We will consider this Clause as qualified by the Words, Not otherwise disposed of; that is, taking it for granted that a Fee passes by the Words, the Residue of all my Estate real and personal, how will it be if the Words, Not otherwise disposed, be added? And it has been insisted on, that these Rents are otherwise disposed of by the Will; for the Duke devises, That his Executors, if Occasion shall be, shall sell any Part, or all of them, for Payment of his Debts and Legacies: So this is said to be Disposition enough, to make them out of the general Clause of the Will. But sure if this Authority given to the Executors be not a Disposition, then the Rents are not exempted out of the Words of the general Clause; and it is plain, that giving an Executor Power to sell, is no Disposition; for the Executor in this Case takes no Estate, but only has an Authority which when executed, and the Executor in pursuance thereof makes a Sale of the Rents, then and not before are they disposed of, and excepted out of the general Clause of the Will; but if the Executors don't sell, or if there be no Occasion for them to sell, in which Case they cannot sell, then there is no Disposition. 2 Vent. 285.

R. To the Words, (Not otherwise disposed.)

That giving an Executor Power to sell, is no Disposition.

One seised of divers Messuages in several Parishes, devises some of them in Fee, and some for Life, and then devises all his Messuages not before disposed of; and held the Reversion of the Houses devised for Life would pass. Indeed, the Executors, in Case of Deficiency, are enabled to dispose of these Rents; but if they don't, or if there be no Occasion, they are not disposed of, and therefore given to the Earl. Aleyn 28.

In Case of Deficiency, Executors might dispose.

A. seised of the Manor of Dale, and other Lands, devises Part of them for six Years, and then devises the rest; it was held, that by the Word Rest, the Reversion of the Part devised for Years passed.

By the Word Rest a Reversion may pass. Ante 106.

If a Man seised in Fee of several Lands and Tenements in Dale, devise all his Lands to B. and his Heirs; but if my personal Estate be not sufficient to pay my Debts, then I Intend that Black-acre shall not pass; if the personal Estate be sufficient, it shall pass.

It is plain the Executor had not Power to sell them, but upon a Condition precedent; that is, in case his Debts and Legacies could not be paid within six Months after his Death; and pray how comes the now Duke of Bolton to claim them if they were disposed of by the Will? If they are disposed of, he can have no Claim; if not, they are devised to the Earl: But who shall have them during the six Months, till

The Executor had not Power to sell, but upon Condition precedent.

'till it be known whether they shall be disposed of or not? Sure the Earl shall, for 'till then they are not disposed of.

And where in another Clause of the Will the Duke takes Notice that he has not disposed of these Rents by these Words, Notwithstanding that I have not devised them by this my Last Will.

They were not otherwise disposed than generally.

Answer. It is plain from what has been said, that by the general Words they are disposed of; but then what can be the Meaning of these Words? It must be, notwithstanding that they are not particularly devised to that Purpose, or otherwise than generally, and it is no new Matter to reject loose Words out of a Will, rather than the Intent of the Testator should be frustrated: Hob. 65. So these Words may be rejected here.

As to the Intimation that a Sale of these Rents were contracted for.

But some will say, Sure it was not the Intent of the Duke to devise these Rents to the Earl, since he takes Notice that he had contracted for the Sale of them, and the Devise to the Earl could not have prevented the Contract's taking Effect.

Answer. It is plain, notwithstanding the Sale or Contract, he did devise them; for if the Debts and Legacies were not paid within six Months, he devises his Executors to sell them; and in case he, with whom the Contract is made, does not perform, then he devises to the Earl; and if the Rents had been sold according to the Contract, it had been no Prejudice or Diminution of the Earl's Legacy, for the Surplusage after Debts and Legacies paid would come to him as Residuary Legatee.

As to the last Clause of the Remainder of the Rents, &c.

4. Considering the last Clause of the Will, whereby he orders these Rents in case of Deficiency, &c. to be sold, and the Remainder thereof, after the Debts and Legacies paid, to go to the Earl: I say, considering this Clause, with other scattered Clauses in the Will, the Rents thereby will pass.

Remainder here, how to be taken.

Some Doubts have been made, whether the Word Remainder of my Rent be sufficient to pass these Rents: 1. Because a Remainder is a Residue of something; so that if there be nothing sold, nothing can be a Residue, or a Remainder: This depends upon the Construction of the Word Remainder, whether there be a Necessity to sell to make a Remainder. But I don't think the Word Remainder here is to be taken for a Remnant of a Torum, when Part is extracted from it; for if the Rents are not sold, then they remain unsold; and the Word [Remainder] shall be understood for the Rents remaining unsold.

Remainder of a Thing created *de novo*, good.

1 Lev. 144.

Carth. 52.

2 Keb. 29,

55, 84.

2 Salk. 577.

Plo. 35. a.

15 E. 4. 9.

contra.

v. 3 Wms.

230.

This Word Remainder made some Dispute, which lasted for above an Age: It was a great Question, Whether there could be a Remainder of a Thing created *de novo*? For there cannot be a Remainder of a thing that never had been before: Since a more reasonable Construction has been made. Plowd. 35. 1 Sid. 285. A Man by Deed grants a Rent to A. and the Heirs of his Body, Remainder to B. and his Heirs, good Remainder.

Devise is here of the Fee-farm Rents, to make thereout such annual Payments as Devisee pleases; if it were a Sum in gross, it would be a Fee according to Collier's Case, 1 Bulst. 75: Mo. 152, 852. Palm. 392. 2 Cro. Spicer's Case, 527.

If only an Estate for Life had come to the Earl, the Security of Payment of the Annuities must be diminished, and can it be intended but that the Duke intended the Security should continue as long as the Annuities were to be paid? Which could not be, if the Earl had only an Estate for Life; for suppose they, to whom the Annuities are payable, should out-live the Earl?

Et per tot' Cur', Plaintiff had Judgment.

Judic' pro
Quer'.

Carleton *versus* Mortagh.

1 Salk. 268.
S. C.
Ld. Raym.
1005. S. C.
Post 206.
Error for
Want of an
Original, and
a Release of
Errors plead-
ed.
Post 174,
206, 235.
1 Salk. 267;
269, 270.
V. Hob. 164.
1 Cro. 84.
Moor 700.
1 Leon. 22.
Hob. 54.

WANT of an Original was assigned for Error, and a Release of Error pleaded: The Doubt was, Whether the Court, after a Release of Error pleaded in this Case, might award a Certiorari ad informand' conscientiam, to be certified if there were an Original to support a Judgment for a just Debt? And it was agreed, The Party could not demand it of Right after this Plea, and Diversity was endeavoured at, between where the Party himself does expressly confess or admit a Thing, for there the Court ought not to desire any further Information; but where the Admittance is not express, but implied, or by nient dedicere, it is otherwise.

Vide 2 Lev.
234.
If Error be
assigned,
which in
Truth is no
Error, and
the Release
is found
against the
Defendant,
&c.
Judgment
shall be af-
firmed.

Against which, Holt, Ch. J. put this Case: In Annuity, Riens arriere is pleaded: The Jury find, that there was no Rent behind, and it appears to them that there was no Grant; yet they cannot find a Non Concessit contrary to the Admittance of the Party: And he said, If Error be assigned which in Truth is no Error, and the Defendant plead a Release of Errors which is found against him, yet the Error assigned being bad, Judgment shall be affirmed, because the Issue taken upon the Release was impertinent.

And Powell quoted 8 Ed. 4. 8. by Litt' & Moyle v. Danby. That upon a Release of Error, if it be found against the Defendant, yet the Court shall proceed to examine the Judgment; but if it be found for the Defendant, the Judgment shall be to bar the Plaintiff of his Writ; but if there be no Error at all, and the Release be found against him, Judgment shall be affirmed: And it was put in the Paper to be spoke to solemnly.

And at another Day, Ward quoted 1 Roll. Abr. 789. E. 7 Ed. 4. 16. Bro. Err. 165. 6 Ed. 4. 3. 8 Ed. 4. 8. 9 Ed. 4. 32. 1 Jo. 352, 373. 2 Cro. 415. all upon the same Opinion with 8 Ed. 4. 8. before quoted by Powell.

And being moved again the last Day of Term, Holt, Ch. J. said, If the Plaintiff in Error assigns that for Error particularly, which is not so, or the general Error, and the Defendant plead not In nullo est

Why may not
a *Certiorari*
be awarded
ad informand'
Conscientias,
concerning
an Original.
1 Salk. 269,
270.
Post 206.

Adjournatur.

Privilege
pleaded.

If Matter of
Fact be plead-
ed in Abate-
ment.

2 Salk. 515,
& 545.

Ld. Raym. 135, 136, 337, 898, 1173. Cas. temp. An. 167. Stra. 864.

If Property
be altered
upon a Sale
by false Infi-
nuations.

Vide ante
105.

1 Salk. 379.

Ante 30.

Post 178,

169.

After an In-
dictment, &c.
how Defen-
dant's Plea
may be re-
ceived.

1 Salk. 169.

S. C.

Ld. Raym.

1015. S. C.

Prescription

of Common

for Cattle le-

vant and cou-

chant, good

to a Messuage

or Cottage,

&c.

3 Keb. 44.

Vide 1 Bull.

50.

2 Brownl. 101. Vaugh. 253. Ld. Raym. 726. Cas. temp. W. 3. 33. Cas. temp. An. 53, 72, 73.

Erratum, but a Release, which is either insufficiently pleaded, or if well-pleaded, upon Issue found against him, there the Court ought not to reverse the Judgment without examining if the Error be good: Now why should not we have a *Certiorari ad informand' conscient'*, though the Party of Right cannot demand it? Vide 5 Co. Bishop's Case, 1 Jo. 139. Suppose want of Original be assigned for Error, and it be returned, that there is no Original of that Term, the Defendant in Error, if there be an Original of another Term, ought to make such a Suggestion on the Roll, of an Original of another Term; for if he plead *In nullo est Erratum*, he is thereby concluded from making such a Suggestion: Yet the Court may award a *Certiorari*, because there may be an Original of another Term: Sed adjournat' till next Term. Vide postea 206.

An Attorney of the Common Pleas pleaded to the Jurisdiction of the Court. Vide 1 Salk. 1, 2, 4, 30.

Per Cur'. He shall not be sworn to his Plea, nor need the Writ of Privilege be set out at large: And if Matter of Fact be pleaded in Abatement, and found against the Defendant, Judgment final shall be given.

A Man comes to a Merchant, or other Dealer, and by false Insinuations, and Account of himself, prevails with the Merchant to sell him Goods upon Tick.

Holt, Ch. J. seemed to incline, that that was not such a Cheat as would alter the Property.

Domina Regina *versus* Tracy.

PER Cur', After an Indictment by the Grand Jury, a Plea is not to be received in the Office, without the Defendant gives Security to try it at his own Charges; but if the Defendant comes into Court, and pleads, his Plea shall be received, but he shall be committed if he does not give Security to try it: If the Defendant gives Security to try it, it must be at his own Charge; if he goes to Gaol, it must be at the Prosecutor's Charge.

Emerton *versus* Selby.

Noway was for Common, setting forth a Prescription of Common, for Cattle levant and couchant, upon such a Cottage.

Per Cur', It is good to a Messuage or Cottage, for Cattle levant or couchant; but it has been questioned in the Year 1653, whether it could be good of Common sans Number; and the same has been of late in the Common Pleas, but nothing done in it. And a Cottage implies a Court and Backside, for Cottage with less than four Acres of Land, is against the Statute of 31 El. c. 7.

And

And Holt, Ch. J. said, He had known Levancy and Couchancy tried in an Issue before Hale; and that Hale said, the Fothering Cattle in the Backside would suffice; and Judgment here for the Avowant. Vide 1 Salk. 169. Co. Lit. 5. b. Co. Ent. 649. 2 Inst. 736.

Fothering
the Cattle
sufficient.

And per Cur': It would be hard to defeat it, in case it were prescribed to Common sans Number.

Morgan versus Tomkins.

If there be an Outlawry upon an Indictment, and that is after set aside, the Judgment stands good and open to proceed upon: But if Judgment be upon an Indictment by Nil dicit, or any other Judgment by the Court, and that be reversed, all is set at large, and there is an End of the Indictment: And it has been held in Kelyng's Time, That if a Forcible Entry were traversed, yet there should not be a Restitution, in the Case of the King *versus* Carle. But the contrary has been held since, and before; and that there is no Way to prevent Restitution, but by Certiorari, or pleading that the Party had Possession for three Years before. Vide Stat. 39 El. Per Cur' omnem.

If an Outlaw-
ry upon an
Indictment,
be set aside,
&c.

Forcible En-
try traversed.

Restitution
prevented.

Per Holt, Ch. J. Upon an Habere facias Possessionem, the Execution is not compleat till the Bailiff deliver the Possession, and is gone.

Execution
upon Hab' fac'
Possession.
Antea 27.
Post 298.

Per Holt, Ch. J. If a Ban lays a Day in his Declaration that is not material, and the Defendant by his Plea makes it material, and then the Plaintiff in his Replication varies from the Day in the Declaration, it will be a Departure; otherwise if the Day had not been made material by the Plea.

If a Day not
material in
Narr' is made
material by
Plea, &c.

Walden versus Holman.

Holman was sued by the Name of B. H. and pleaded in Abatement, That he was baptized, and always known by the Name of J. Absque hoc that he the said J. was ever called, or known by the Name of B. H. Plaintiff replies, That he was known by the Name of B. from the Time of his Baptism. To which the Defendant demurs: And it was urged, that the material Part of the Plea was, That he was baptized by the Name of J. and if so, the Plaintiff ought to answer that; for if the Defendant were baptized by the Name of J. he could not be known by any other Name of Baptism; for one can have but one Name of Baptism; and the Absque hoc coming after that, which is a material Plea, is frivolous, and therefore not to be regarded: And to this Opinion Powell strongly inclined, for that he thought to say that he was baptized by another Name, without more, was a good Plea in Abatement, and therefore the rest was nugatory.

1 Salk. 6, 7.
S. C.
Ld. Raym.
1015, 1016.
S. C.
Abatement
for misnomer,
with a Tra-
verse, Repl'
& Demur'.
Vide Cro. El.
897.
Cro. Jac. 558.
2 Brownl. 48.
Post 225.
Noy 135.
2 Roll. Abr.
135.
4 Mod. 347.
Obj. That the
Traverse was
frivolous.
Ld. Raym.
118, 509.
Holt, 249.
Stra. 556, 816, 1218.

R. He had
here made
his Name J.
but an In-
ducement to
the Traverse
of B.

How a Man
may plead,
tho' he never
was baptized.

V. 1 Inst. 3. a.

New Name
may be by
Confirmation.

Vide 5 Co.

43.

Poph. 57.

Noy 135.

Cro. El. 57.

222.

Cro. Jac. 558.

1 Brownl. 47.

1 Keb. 427.

14 H. 7. 11.

3 H. 6. 26.

2 Rol. Abr.

135.

Holt, Ch. J. & reliqua Cur' contra; for admitting that it might be relied upon for a Plea, that he was baptized by such a Name, yet that is not done here, but it is only made an Inducement to a Traverse; which Matter of Traverse is not immaterial, but would be a good Plea in Abatement; for it is a good Plea in Abatement for a Defendant to say, that he was known and called by such a Name, tho' he never was baptized, as many Thousands in England never were: Nor is it true to say, That one baptized by the Name of J. cannot be known by another Name, as well as Sir Francis Gawdy acquired a new Name by his Confirmation, without, as Holt, Ch. J. said, losing his Christian Name; at least he said he was not satisfied that his Name of Baptism did cease, upon his taking a new Name of Confirmation, as Powell would have it.

And Brotherick at the Bar remembered a Case wherein he was of Counsel; in which it was held, That it is not a good Plea in Abatement for a Defendant to say, That he was baptized by another Name, without shewing likewise that he was always known by it; and not put the Plaintiff to shew how his Name was altered to enable him to sue them.

Bro. Misno-
mer. 2, 4, 7, 43.
Respond.
Ouster.

And Darnell, Serjeant, affirmed the same Thing: And Judgment to answer over.

2 Salk. 459,
460. S. C.

Roswell *versus* Pryor. M. 13 W. 3.

In Case for
Stopping the
Plaintiff's
Lights.

1 Vent. 237,

239.

Post 314.

9 Co. 58.

1 Mod. 55.

Ld. Raym.

713.

Vide Hob.

131.

Hart. 136.

CASE for Stopping Plaintiff's Lights: Declaration was, That the Plaintiff was possessed of such a Messuage for a certain Term of Years, & habuit & habere debuit such and such Lights thereunto; and Question, Whether this was a good Declaration, without saying, It was an antient Messuage with antient Lights?

Holt, Ch. J. If a Man has a vacant Piece of Ground, and builds thereupon, and that House has very good Lights, and he lets this House to another; and after he builds upon a contiguous Piece of Ground, or lets the Ground contiguous to another, who builds thereupon, to the Nuisance of the Lights of the first House: The Lessee of the first House shall have an Action upon this Case against such Builder, &c. for the first House was granted to him with all the Easements and Delights then belonging to it; and it was agreed, That formerly the Way was to declare of antient Lights, and antient Messuage, but now that was altered. Vide the Case of St. John *versus* Moody, per Cur'.

Vide 2 Lev.

194.

1 Vent. 274.

Post 313,

314, 193,

194.

Elwis *versus* Lombe.

Error of a Judgment in Trespass in the Common Pleas, where it was for Vi & Armis taking away ten Mattocks of the Plaintiff in R. Defendant as to Nine pleads Not guilty; and as to the Tenth, Actio non, quia Locus in quo is his Liberum Tenementum, and that the Mattocks was there Damage fasant. And upon general Demurrer, the single Question was, Whether this general Way of pleading Liberum Tenementum, without shewing any further Certainty, were good? And Judgment was for the Plaintiff in the Common Pleas.

Error in
Trespass in
C. B. for
taking the
Plaintiff's
Mattocks,
and Liberum
Tenementum
pleaded,
1 Keb. 433.
2 Keb. 57.
3 Keb. 286.
3 Lev. 203,
204.

And now Salkeld argued for the Plaintiff in Error, the general Error being assigned. Either the Liberum Tenementum must take in all the Will of R. viz. That all the Will is the Freehold of the Defendant, and then without Question the Plea will be good; or it must be taken of a particular Place not certainly known or described within R. and take it to be the last, and so the more strongly against him, yet it will be well, especially upon a general Demurrer.

1. The Plaintiff, in his Replication, might have ascertained the Place with the same Advantage to himself, as if the Defendant had done it in his Plea, by making a novel Assignment.

2. The Bar is as certain as the Declaration, and less Certainty is required in a Bar than in a Declaration, especially when the Bar is a Common Bar.

3. Where-ever the Plaintiff may be general in his Writ and Count, the Defendant may be as general in his Plea; and if the Plaintiff looks for more Certainty, he himself must make it in his Replication. Before the Statute of 27 El. the old Books run both Ways; that is to say, the Locus in quo is an Acre of Land in Dale, Liberum Tenementum of Defendant, as they would have us have done here; or else generally Liberum Tenementum, as we have said. 39 H. 6. 6. a. is full in Point for me. 4 Ed. 3. 11. b. Fitz. Bar. 20. that in Clausum fregit, or de Bonis asport, son Franktenemen' is a good Plea.

Ld. Raym.
707, 334,
923, 1230.
1 Barnes 233.
Stra. 5.
Where Son
Franktenement
is a good
Plea.

Indeed, some Books take this Difference, That where the Plaintiff shews the Certainty of his Title, there the Defendant ought to be certain and particular in his Plea, and to ascertain the Place; otherwise where the Plaintiff does not shew the Certainty of his Title. And in such Case, if he plead Liberum Tenementum generally, he need not shew any more Certainty; but if he plead Freehold by Descent, Gift, &c. he must shew Certainty of Place. 3 H. 6. 34. 5 H. 7. 38. seem indeed against me for Trespass for taking the Plaintiff's Cattle. Defendant pleaded, That the Locus in quo was his Freehold, and that he took them Damage fasant, and held bad; for they compared the Damage

Where it
ought to be
more certain.

lesant to the making of a Title, but that Damage lesant is not traversable, but a Consequence of the Freehold's being his.

The Reasons given in the Books for the foregoing Diversity are Two, and both of them fail:

Where *Liberum Tenementum* is traversable, or not. 8 Co. 47. b. 48. 3 Lev. 203, 204.

The first Reason is, That *Liberum Tenementum* generally is not traversable; but *Liberum Tenementum* by Feoffment of J. S. &c. is traversable, therefore it ought to be alledged so as to be traversable. But that *Liberum Tenementum* generally is traversable, vide Dyer 23. b. 2 Cro. 59. Cro. El. 137, 812. Rast. 548.

The Second Reason given is grounded upon the first, that being not traversable, the only Use of it is to force a Replication; but that cannot be good, for since it is traversable, it is in the Plaintiff's Power to traverse it, and not to reply. And there is no Plea of any other Use but to force a Replication, but such as are allowed by Law as such, to avoid Prolixity of Pleading; as, Performavit omnia, Non fuit damnificatus, &c.

That where the Plaintiff is general in his Count, the Defendant may be as general in his Plea.

But the true Reason why *Liberum Tenementum* generally is a good Plea, is, That where the Plaintiff is general in his Writ or Count, the Defendant may be as general in his Plea; and if the Plaintiff will have more Certainty, he must make it in his Replication.

Difference of Demurring since 27 El.

Now to consider this Case since the Statute of 27 El. of Demurrers, before which there was no Difference between Matter and Form as to Point of Demurrer: Though, before that Statute, one might demur specially; but it was never safe or necessary so to do, in any Case except that of Duplicity, because if one had demurred specially, he could have insisted on nothing else but what he had specially shewn for Cause in his Demurrer; whereas if he had demurred generally, he was left at large to insist upon any Thing except Duplicity. Nor was this any Way inconvenient, for while all the Pleadings were Ore tenus at the Bar, tho' the Demurrer were general, yet the Matter was so scanned, that the Court and Parties well knew what the Cause of Demurrer was. But after that Way of Pleading came to be disused, the Court nor Party could not know it; and for that the Statute was made which restores the Common Law, so far that People may know what a Demurrer is for, whether for Matter or Form; for if the Demurrer be for Matter, the Entry is, Quia Materia in Placito, &c. minus suff', &c.

Vide 1 Salk. 219.

1 Saund. 337.

1 Vent. 240. Vide Hob. 232.

Ld. Raym. 22, 357, 393. Cas. temp. Mac. 280, 281, 268, 323, 324, 348.

There are indeed some Exceptions to the Rule, That a Circumstantial Fault in a Plea will not vitiate upon a general Demurrer: As where a Deed is pleaded, and no Profert made of it. But the Reason of that is particular, viz. That by pleading a Deed without a Profert, you put a great Difficulty upon the Party to answer it. Vide 9 Co. Tresham's Case. 1 Lev. 132, 190. and the Case of Horne *versus* Linne, H. 12 W. 3. in this Court. Replevin and Abowry for Rent, Replic' de Injuria sua propria, absque hoc That there was any Thing behind.

1. Held,

1. Held, That this was such a Plea as would force an unnecessary Replication, and for that would be bad upon a special Demurrer, but good upon a general one.

Where a Plea would force an unnecessary Replication.

Besides, the Plaintiff might have ascertained the Matter by a new Assignment, whereof the true Reason is given in Plowd. 84. that where the Plaintiff is general in his Writ or Count, the Defendant may be as general in his Plea.

Vide 8 Co. 120, 133. 9 Co. 37. Cro. Car. 209.

There are two Ways of Pleading Liberum Tenementum, the one without any Manner of Certainty, the other with a Certainty.

Co. Lit. 303. Hetl. 174.

1. If there be any Certainty, as that the Place where is Black-acre, Liberum Tenementum of him, then the Way to reply is to make a new Assignment.

11 H. 7. 24. 7 Co. 25. Two Ways of pleading Liberum Tenementum.

2. If there be no Certainty, the Way is to ascertain the Place, and to make himself a Title to it in the Replication. Vide Old Book of Ent. 43. Rast. 648. 3 H. 6. 34. Dyer 23.

And this can be no Prejudice to the Plaintiff, for the Affirmative being upon the Defendant, he must make Title to the Place where the Taking is, or he is gone; for which he quoted Lane's Case, Hill. 4 Car. 1. in Judge Godbolt's Manuscript: Trespass Quare Clausum fregit in A. B. and C. Defendant pleaded, That the Locus in quo was Black-acre, White-acre, and Green-acre, his Freehold; and Issue thereupon: And because the Defendant could not prove his Freehold in them, as alledged, Verdict against him. For the Court said, That though it be usual for the Defendant to lay a feigned Place in his Plea, to force the Plaintiff to a new Assignment, yet it is dangerous so to do; for if Issue be taken thereupon, and he cannot prove his Plea, he is gone.

Cur. You don't consider that you are in a transitory Action, in which there is no such Thing as a Locus in quo: If it had been a local Action, without Doubt the Pleading had been good. If a Man declare Quare Clausum generally, in such a Will, the Defendant may plead Liberum Tenementum, and if the Plaintiff traverse it, it is at his Peril; for the Defendant, if he has any Part of his Land in the whole Town, shall justify it there; and therefore in that Case, the better Way is to make a new Assignment.

Cur. You are in a transitory Action, and don't consider it.

Sed vide Dyer 23.

But now there is a fix'd Course established in the Common Pleas, as was also in this Court formerly, That in local Actions the Plaintiff shall ascertain the Place in his Declaration, to prevent such general Pleas, and a Prolixity of a new Assignment; and the Defendant is confined to the Place ascertained in the Declaration: But here the Defendant, by pleading of Damage feasant, has made that local that was at large before, and therefore he ought to ascertain it at his Peril.

Vid. Hob. 176.

Vide Hob.
104.

And they all agreed, That if a Man bring Trespass for taking his Cattle in Black-acre on such a Day, and the Defendant justifies the Taking at another Place Damage feasant, the Plaintiff may make a novel Assignment, if there were two Takings: So if there were two Batteries on one Day, and the one were on the Plaintiff's own Assault, and the other not, if the Defendant will justify one de son Assault demesne, he may make a new Assignment of the other Battery.

Judgment
affirm'd.

Et Judic' affirm' per tot' Cur'.

1 Salk. 243.

S. C.

1 Wms. 64.

S. C.

2 Ld. Raym.

1024.

Vide Noy 106.

1 Mod. 96, 97.

102.

2 Sid. 61.

Mar. 54, 45.

Godb. 166.

Dyer 196.

4 Leon. 242.

Co. Lit. 110,

b. 140.

Cro. Jac. 198.

Cro. Car. 411.

Special Ver-

dict, That a

Man had five

Sons, and the

youngest died,

living the Fa-

ther, leaving

a Daughter.

Per Cur'. Bo-
rough Eng-
lish descends
to the young-
est Son, and
his Daughter
has good
Title.

That former-
ly all Lands
were general-
ly Gavelkind,
but since al-
tered.

Caf. temp.

W. 3. 623,

624.

V. Wright's

Ten. 31, 32,

175, &c.

178, 207,

&c. 214.

Robinson of Gavelkind in Appendix.

Caf. temp. Talb. 276, &c.

Clement *versus* Scudamore.

SPECIAL VERDICT, finding that the Lands in Question were Copy-
hold Lands, Part of the Manor of Croyden in Surrey, of the
Nature of Borough English, and that the Custom of the Manor was,
That all Copyhold Tenements of that Manor did and ought to de-
scend to the youngest Son and his Heirs: That one F. W. had Issue
five Sons, the youngest whereof died, living the Father, leaving
Issue a Daughter. After the youngest Son's Death, the Father
purchased the Lands in Question, and is thereunto admitted, to have
and to hold according to the Custom of the Manor, and after died
seised, and the Fourth Son entered; upon whom the Daughter of
the Fifth Son entered, and made Lease to the Plaintiff: So the
Question was, Whether the Daughter of the youngest Son, dying
in the Life of the Father, has good Title as Representative of her
Father, who, if he had lived, would have inherited as Heir to his
Father? And Holt, Ch. J. who delivered the Opinion of the Court;
We are all of Opinion, the Daughter has good Title.

1. It is to be considered, that where this Custom of Borough
English is for the youngest Son to inherit, that by this Custom the
youngest Son is put into the Room and Stead of the eldest Son at
Common Law; for as an Inheritance by Common Law shall go to
the eldest Son, so by this Custom it shall go to the youngest, with-
out any Difference: Therefore since this Custom alters the Descent
from the eldest to the youngest Son, there is the same Reason that
the Representative of the youngest shall take, as there is at Common
Law for the Representative of the eldest: And there ought not to
be any Difficulty herein, for it appears (tho' Coke be of a contrary
Opinion) that all the Lands in England before the Conquest, and
for some Time after, were generally Gavelkind. Vide Lamb. Saxon
Law 167. Selden's Notes in Eadmerum.

But soon after the Conquest, for the better Strength and Support
of the Crown, Knight-Service Tenure was introduced, and the
Course of Descent altered, and the whole was made descendible to
the eldest Son, to the Intent that these Tenants in Knight-Service,
who

who by their Tenure were to wait on the King in his Wars, might do it with more Dignity and Grandeur: So in this Instance the ancient Saxon Law was then altered; but notwithstanding that hereby the eldest Male was preferred before the youngest, and the Male always before the Female, yet the Right of Representation remained even to this Day.

Vide Hales's
Hist. Leg. c.
11. p. 230,
231, &c.
That the Right
of Representa-
tion remains.

2. This Right of Representation has been considered in all Countries and Nations: By the ancient Law of Israel, Ch. 26, 27 of Numbers, an Account is given of this Manner of Representation; it was a Law that the Male should inherit all, but upon Failure of them the Female; and it was a Law, as some say, brought out of Egypt, but always practised, that the eldest Son should have a double Share; but this was not only quatenus he was eldest, but as he was Representative too: Vid. Seld. de Successionibus, c. 23. that Daughter should in that Case have a double Portion; so that Representation was always practised by Greeks and Romans, even by the Law of the 12 Tables.

Right of Re-
presentation
practised in all
Countries and
Nations.

But in the third Place, this Right of Representation has not only Room in Inheritances descendible according to the Course of the Common Law, but holds also in Inheritances descendible according to Custom: For in case of Gavelkind, which now we know to be the Custom of Kent, if a Man have three Sons, and purchase Land in Gavelkind, youngest Son in Life of the Father dies, leaving Issue a Daughter, no Doubt the Daughter shall inherit; but if the Purchase had been to the Father, and Heirs Male of his Body, the Daughter had been excluded per formam Doni; but the Custom making it descendible to Heir Male, makes Room for Representative of him; and there is no Difference between Gavelkind and Borough English, but secundum majus & minus; in Gavelkind all the Sons take all; in Borough English the youngest takes all; and the Law takes Notice of both these Customs; for which he quoted the Case of Fane v. Barr, in the Common Pleas, Hill. 1659. Rot. 773. Custom was for a Copphold to descend to the youngest Son, and not to the eldest Brother: A Coppholder surrendered the Land to another and his Heirs; but before Admittance Surrenderee dies, leaving two Sons; and the Question was between the two Sons, and adjudged that the eldest Son should be admitted, because the Custom was, that the Estate should descend to the youngest Brother, and there was no Estate in the Ancestor to descend; and therefore the eldest Son must have taken as Purchaser: But according to the Report I have of the Case, the Court said, That if the Custom had been laid to have been Borough English, the eldest had been excluded, for the Law takes Notice of Borough-English and Gavelkind Customs. In this Case, the Custom as found is so far from excluding the Daughter, that it expressly comprehends her; for the Custom is, that the Land is of the Nature of Borough English, and did and ought to descend to the youngest Son, and his Heirs. So that it is not only that it ought to descend to youngest Son, but also to him and his Heirs, tho' it had been

That it holds
in Inheritances
descendible
according to
Custom.
Vid. Noy 15.
Dyer 5. b.
1 And. 191.
2 Lev. 87.
Cas. temp.
An. 107, 160.

Difference be-
tween Gavel-
kind and Bo-
rough English
and the Law
takes Notice
of both.
Vide Stat.
31 H. 8. c. 3.
18 E. 6. c. 14.

Nota.

How the Right
of Entry shall
descend.

the same Thing to me; for if Father be disseised, or make a Feoffment during Infancy, this Right of Entry shall descend to the youngest Son, and if he die before Entry, it shall descend to his Daughter, though the Father died not seised of the Land. 8 Co. 43. Jo. 361. 1 Cro. 410.

Heir shall
have his Age,
or Parol shall
demur.

If there be Descent of Land in Borough English on Heir under Age, and real Action is brought, he shall have his Age, or Parol shall demur, as it would in Cases of Inheritance at Common Law; and what Reason can there be, why it should have those Qualities, and not the other Qualities as representative Right? And he approved of the Opinions of Berkly and Brampton in the Case of Reeves & Malster, 1 Cro. 410. for he said, If the other Opinion had prevailed it would beget abundance of Confusion, but following the other would settle Things upon a lasting Foundation. Et Jud' for the Daughter.

Judgment for
the Daughter.

Vide 1 Salk.
97, 99.

Grovenor *versus* Soame.

Sheriff takes
one Bail-Bond
upon a Debt by
three jointly
and severally.
Plaintiff takes
an Assignment,
and would
have Sheriff
amerced:

ONE Joint Bill of Middlesex against three, with an *Ac etiam* super scriptum obligatorium, by them jointly and severally: The Sheriff took one Bail-Bond for the Appearance of them three; and there being no Appearance, the Plaintiff took an Assignment of the Bond, and now would have the Sheriff amerced.

First it was agreed, That the Bail-Bond was not according to the Statute, being for a Joint Appearance to several Actions.

Agreed the
Bond was not
according to
the Statute.

V. 1 Vent. 55.

1 Sand. 60.

1 Mod. 33,

240, 244.

2 Saund. 60,

154.

1 Vent. 85.

Vid. antea 47.

Ld. Raym.

425, 722,

1564.

Caf. temp. W.

3. 447.

Caf. temp.

An. 170.

Caf. temp.

Mac. 289,

290, 291.

2 Barnes 63,

66.

If same Bail

be to the Acti-

on after Assign-

ment, Plaintiff

may except a-

gainst them.

Judgment

signed after

Release plead-

ed, and Oyer

denied.

Ld. Raym.

347, 892, 970,

1056, 1176.

1 Barnes 158,

168, 169,

185, 250.

2 Barnes 200.

Strat. 227,

1186, 1198,

1241.

And Holt, Ch. J. said, It had been adjudged in Ch. J. Glyn's Time, that if the Sheriff takes insufficient Bail, and has not the Party at the Return of the Writ, an Action would lie against him; but the contrary has been held since in the Common Pleas: It was indeed always agreed, that Action would not lie for taking insufficient Bail; but it was not settled, whether it would not lie for taking insufficient Bail, and not having the Party at Return of the Writ; for tho' the Statute commands him to take reasonable Bail, yet if he has not the Party, he shall be amerced, and the Statute does not exempt him from that: The Writ was, in placito Transgr' ac etiam Billæ, and Bail-Bond was to appear in placito Transgr' only, and held good in Hale's Time: And tho' all the Clerks said, They knew the Sheriff amerced after Assignment of Bail-Bond, yet Holt, Ch. J. said, He had known it denied; Et per reliquos Justic': If one accept of Assignment, and the same are given as Bail to Action, that were Bail to Sheriff, he cannot deny them: But per Holt, Ch. Just. If the same that were Bail become Bail to Action, and he except against them, and they do not justify, he may go on with Amercements against the Sheriff.

Per omnes Clericos. If Release be pleaded, and the Plaintiff crave Oyer of it, and Defendant will not grant it, Plaintiff may sign Judgment for Want of a Plea. Vide Morris's Case, 2 Salk. 497. Con. Vide ante 27, 28.

-Sir

Sir Samuel Astry's Case.

HE being Master of the Crown-Office, and having been absent from the Exercise of his Office for a considerable Time, being fractus senio, a Sci. fac. was brought against him; and Issue being joined, he now moved for a Trial at Bar, which the Attorney General opposed as a Matter of Privilege, that the Queen might try her Causes at Nisi prius, or at Bar, as she pleased.

Cur': It is the common Right of any Gentleman at the Bar, to have a Trial at Bar, and it never has been denied in the Case of an Officer of the Court: And tho' Mr. Attorney may have any of the Queen's Causes tried at Bar, and is not bound to consent to a Nisi prius, yet we are not satisfied that he ought to have a Nisi prius where Trial at Bar is reasonable, without Consent; for the Statute of W. 2. cap. 30. which was the first Statute of Nisi prius, says, That if Matter require great Examination, it ought to be at Bar: Et adjournat' and nothing ever was done in it.

Ld. Raym. 1556. 1 Mod. Caf. in L. & Eq. 316. Fitz-G. 40. Stra. 822, 1049.

Cuddon, Chamberlain of London, versus Provost.

Return was upon a Habeas Corp', that London is an ancient City, &c. that Time out of Mind there was an ancient Beam kept at the Charge of the City for the Weighing of all such Goods as were usually bought or sold by Weight in London, at which all Foreigners ought, and Time, &c. used to weigh all such Goods, &c. And then sets forth their Custom of making By-Laws for Explanation of their Custom, and a By-Law made at such a Time, the same as in the Case of Bernardiston, 1 Lev. viz. That every Foreigner who should sell Goods usually sold by Weight, without having first weighed them at the common Beam, should pay 13 s. 4 d. for every—Weight, that Defendant being Foreigner, &c. And all the Exceptions taken in that Case were insisted on here: And yet the Court after great Consideration awarded a Procedendo, according to the said Case in Lev. 14, 15.

Vid. post. 177.
Return of a
By-Law to
pay for not
weighing
Goods sold by
Foreigners at
the ancient
Beam of the
City of London.
Ld. Raym.
498.
Bernardiston's
Case, 1 Lev.
14, 15.
Procedendo
awarded.

Cudden versus Estwick.

1 Salk. 143.
S. C.

UPON a Habeas Corp. from London, the Return did set forth Custom of London, that Time out of Mind there was an ancient Company of Free-Porters in London, and a Custom to make By-Laws, for the better governing of the said Company; and in pursuance thereof, an Act of Common Council inflicting such a Penalty on any that should employ any not free of the said Company in Portage-work, and that the Defendant did, &c. So the Doubt was, whether such a * By-Law, inflicting a Penalty upon Strangers for employing one not free, were good? For it was agreed, that a By-Law that none but a Free-Porter should do the Work, would be good, with a Penalty; and in Reference to By-Laws in general, a Difference was taken between a private Corporation or Company, and a great City

Upon a By-Law returned concerning the Company of Free-Porters in London, &c.
Ld. Raym.
498.
Caf. temp. W.
3. 269, 270,
686.
Caf. temp.
Mac. 131,
133, 135,
338, 339.
1 Mod. Caf.
in L. & Eq.
or 211, 267, &c.
Comyns 269.

269. Gilb. Eq. Rep. 43. Fitz-G. 309, 310, 313. 1 Wms. 183, &c. 2 Wms. 207, 208, 209. Stra. 462, 1085, 675. * 2. If it will bind a Stranger employing one not free, and a Difference taken.

Great Cities
can make By-
Laws to bind
Strangers while
there.

or Borough; for the former can only make By-Laws to bind their own Members, and touching Matters that concern the Regulation of the Trade, or other Affairs of the Company: But great Cities and Towns, as London, Bristol, York, &c. can make By-Laws for the better Ordering and managing such Town, and that Law will bind Strangers to the Freedom of the Town, while within such Towns, and they are bound to take Notice of such Laws at their Peril: And this Diversity was agreed to by the Court.

Holt, Ch. Just. It is true, every Foreigner that comes to a Place is bound to take Notice of the Law of the Place; but here lies the Hardship, that you lay a Penalty upon a Man if he don't take Notice whether a Porter is free or not free, and there is no Way for him to know it.

Procedendo de-
nied because
this By Law
void to bind
a Stranger,
and why.

And at last it was adjudged, that no *Procedendo* should go; and that the By-Law was void to bind a Stranger, who could not have an Action against them for not keeping a sufficient Number of Porters, nor against the Porters for not serving him: And an Act of Common Council, inflicting a Penalty for buying from any but a Freeman, would be void.

Custom against
Reason is void.
Ante 21.
Ld. Raym.
57, 499, 869,
1135.
Fitz-G. 51,
52.
Three Rea-
sons to support
a Custom.

Note; In the Argument of this Case, it was said, that Custom against Reason is void, because it deprives the Subject of the Common Law, which is his Birth-right; and the Reasons by which a Custom is supported, are generally these:

1. Because the Party bound by it, has some Benefit by it.
2. That the Party who claims the Advantage of it, is at some Charge by Reason of it.
3. That it may have a reasonable Commencement, or suppress Fraud.

And the two first of these Reasons held in the Case of Coll-travers, and Coll-through. Vide 5 H. 6. 26.

Ld. Raym.
1029. S. C.
Vide 1 Mod.
35.
2 Keb. 594.
3 Mod. 139.
1 Sid. 65, 144.
Indictment for
Words spoke
to the Mayor
of Salisbury in
Disparage-
ment of Go-
vernment.
Vide 2 Salk.
425.
2 Lev. 200.
1 Vent. 16,
327.
2 Jo. 229.
Farell. 18.
187. Stra. 420, 1157.

Queen *versus* Langley.

HE was indicted for these Words spoke to the Mayor of Salisbury, You Mr. Mayor, I do not care a Farthing for you: You Mr. Mayor are a Rogue and a Rascal: And that the Indictment lay, it was urged, that the Words tended to the Disparagement of the Government, whose Officer this Person was. But to the contrary it was said, That first it was not laid, that he was then in the Duty of his Office, or that he was a Justice of Peace. 2. As to the Disparagement upon the Government, a Diversity was taken between Elective Officers, and such as are nominated by the Queen; for the Corruption of the first cannot reflect upon the Government.

And

Ld. Raym. 153. Cas. temp. W. 3. 98, 414, 514. Cas. temp. Ann. 166. Cas. temp. Mac. 186, 187. Stra. 420, 1157.

And Cur', He might have forced him to find Sureties for his good Behaviour, or committed him: Vide 3 Mod. The King v. Darby, Cro. El. 78. Mo. 347. 3 Cro. 689. They also agreed, That what ever is a Breach of the Peace, is indictable, as sending a Challenge; but that these Words were not a Breach of the Peace, but only occasional, and tending towards it: And after great Deliberation, they adjudged the Words were not indictable; for it is not as much as said, that he was in Execution of his Office, or a Justice of Peace; indeed if they were put in Writing, they would be a Libel punishable either by Indictment or Action; but they are but loose unmannerly Words, like those spoke of an Alderman of Hull, When he puts on his Gown, Satan enters into it, adjudged not indictable in Kelynge's Time: Style 250. You are a forsworn Mayor, and have broke your Oath, not indictable: And binding him to his good Behaviour is sufficient to secure the Authority of Mayors; but that must be done instantly, according to Doctor Bonham's Case.

That he might have bound or committed him.

3 Mod. 139.
1 Sid. 65.
2 Cro. 58.
Hob. 62.
The Words not indictable, and why.
Alit', If put in Writing.
Vide Hob. 121, 215.

Vide postea 8 Co. 116, 118, &c.

And Holt, Ch. J. said, That Words that directly tend to Breach of Peace, may be indictable; but otherwise, to encourage Indictments for Words, would make them as incertain as Actions for Words are.

Words directly tending to Breach of the peace, indictable.

Berwick versus Andrews.

ERROR of a Judgment upon Nil dicit in the Common Pleas; the Case was; Executor brought an Action upon a Judgment obtained by the Testator, suggesting a Devastavit in the Life-time of the Testator: And it was objected, That this carried it a Step farther than Wheatly and Lane's Case in 1 Saund. for there the Action was brought by the Party to the Judgment, and to whom the Wrong was done: Whereas this is, first, by one that is no Party to the Judgment; for if he would sue Execution upon this Judgment, he must have first made himself Party by a Judgment on a Sci. fac'; and next by one to whom the Tort was not done, and this is a personal Tort that ought to die cum Persona, and that this Batter ought not to go a Step farther: Vide 1 Vent. 313. 2 Lev. 145, 209. 3 Keb. 735, 797. That such Action will not lie upon a Bond suggesting a Devastavit; and it being for a Wrong done to Testator, an Action ought not to lie for it for the Executor, no more than it would lie against an Executor of an Executor de son Tort, till 30 Car. 2. c. 7.

1 Salk. 314.
S. C.
S. C. Ld. Ray.
971, 1502.
Error of a Judgment upon Nil dicit in C. B.
1 Saund. 219.
1 Sid. 397.
1 Lev. 231, 255.

Recovery against the Defendant, and Judgment de bonis Testatoris; then Action brought by the Executor on the first Judgment, and suggests a Wasting, the Debt not satisfied.

Mountague contra relied upon the Reason of the Case of Wheatly and Lane, and that of Clather v. Thin, 2 Sid. 102. N. Lutw. 208, 210.

Ld. Raym. 3, 4, 265, 589, 591, 661, 678, 679, 733.

Holt, Ch. Just. The Defendant is the Party against whom the Recovery is, and Judgment is de bonis Testatoris against him; and it is suggested, that he has wasted: This is what the Plaintiff's Testator might have done: Sure if Escape were in the Life-time of

For Escape in Testator's Life, Executor may have Debt against Jaylor. Ld. Raym.

K k

Testator, 36, 40, 698.

3. 71. Cal. temp. Mac 95. Fitz-G. 265, 266. 1 Wms. 687.

Vide Lutw.
66, 412.
N. Lutw. 26.
124, 181,
208, 209,
Vi. 2 Lev. 110.

Vide antea.

1 Vent. 30, 31.
& lib. ibi citat.

Vide Lutw.
670, 671, &c.

1 Salk. 310,
314.

Testator, the Executor may have Debt against the Taylor for it; but such Action would not lie against an Executor, nor would this Action lie against the Defendant's Executor here, as was adjudged in this Court in Hale's Time, because it is a personal Tort, which dies with the Person; and it was compared to the Case of an Escape by the Sheriff, for which Debt does not lie against his Executor, tho' it does against himself; but in Case of Escape, the Action always lies for the Executor, even where it is in his Testator's Time; and shall not the Executor of a Parson have Debt against a Parishioner for not setting out Tithe? Vid. 1 Sid. 407. the Cause why he shall have Debt is, because it is an Injury done to his Right; and therefore within the Equity of the Statute of Ed. 3. De bonis asportat', and a Quare Impedit lies for an Executor upon that Statute, in case he brings it within six Months after the Avoidance; and upon this Judgment, he might have sued a Sci. fac', and after Judgment therein have a Fi fac', suggesting a Devastavit. Now this Action is in Lieu of a Sci. Fac'.

That it is
within the
Equity of the
Stat. De bonis
asportat',
4 E. 3. c. 7.

Powell. Hale used to say, That this Action ought not to be suffered but when there was a Judgment to support it; and this is within the Equity of the Statute De bonis asportat'.

Gould and Powis accordingly: And the Difference is where it is a Tort annexed to Goods, then it is within the Statute, because it ariseth ex delicto, mixed with a Right.

If Executor
may have Case
for a false
Return.

And Powell said, That the better Opinion was, that Case would not lie for an Executor for a false Return of a Process of Execution.

Holt, Ch. Just. I have known the contrary adjudged.

But then an Exception was taken to the Declaration, That it was not alledged that the Debt was not satisfied, but only that the Testator nor Plaintiff could not have Execution of the Judgment; but it may be they were satisfied without Execution.

Foundation of
this Action.

Holt, Ch. Just. The Foundation of this Action stands upon Two Things, viz. The Debt not being satisfied, and the Waste; and in all Actions of Debt, it is incumbent upon the Plaintiff to shew, that Debt is due.

Obj. What if
the Plaintiff
had been paid,
and Issue upon
the Devastavit.

Powell. If the Plaintiff had been paid, the Wasting the Assets could be no Devastavit as to him; and if Issue were taken upon Devastavit or not, the Defendant might give Payment to Plaintiff in Evidence.

Quod Holt negavit, Because the Wasting the Assets, the Debt being not satisfied, is the Cause of Action; and if the Debt be paid, the Issue ought to come upon that, that is a Nihil debet, which may well be pleaded, though this be a Debt upon a Judgment, because this is Matter of Fact; and if you traverse the Devastavit, you admit the Non-payment: And he compared it to the Case of Debt against a Sheriff for an Escape, you must shew the Debt not to be satisfied: And suppose a Defendant in Execution does pay the Plaintiff, and no Satisfaction is entered on Record, and the Sheriff suffers him to escape, and Debt is brought against him for it, he cannot take Advantage of that Payment: And at last, the Record of the Case of Wheatly and Lane was brought into Court, agreeing exactly with this Declaration. And the Plaintiff had Judgment.

1 Saund. 38,
219.

That Case of
Wheatley and
Lane agrees.
1 Saund. 216.
1 Sid. 397.
1 Lev. 231,
255.
1 Salk. 119.
S. C.

Ruffel versus Corn.

False Imprisonment by Husband and Wife, for the Imprisonment of Wife, per quod negotia domestica of the Husband per Spatium—remanserunt infecta ad grave damnum of both: It was moved in Arrest of Judgment, That the Business of the Husband remaining undone, could not be ad damnum of Wife, and that the Action for that ought to be by Husband alone; as if the Husband concludes per quod Solamen & Consortium amisit, he must conclude ad damnum of him alone: But it was answered, That here the Action being well brought, and conceived for the Imprisonment, what came under the per quod would only be taken for Aggravation; as if Words in themselves actionable be spoke of Wife, and Husband and Wife bring the Action, and conclude per quod the Husband lost his Customers, it will be well; for the Words being in themselves actionable, per quod shall be taken for Aggravation.

2 Salk. 642, 3.
Ld. Raym.
1031. S. C.
False Imprisonment brought by Husband and Wife, by which the Husband's domestick Concerns remained undone, ad damnum of both, and well.
Vid. post 149.
2 Cro. 123.
Per quod &c.
is only for Aggravation.
1 Salk. 119.
2 Salk. 642.

Quæ omnia Cur' concessit: Et per Holt, Ch. Just. Matter may be laid by way of Aggravation in Trespass for breaking his House, and beating his Servant, without saying per quod Servitium amisit; no Action lies for the Master for Battery of Servant without per quod, yet it may be well put in as an Aggravation; but if you make two several Counts of it, one of them, viz. for beating Servant, will be bad: Suppose a Man gets another's Maid or Daughter with Child, no Trespass lies for it; but if he that has done it came into the House without the Owner's Leave, he may put the getting his Daughter with Child in for Aggravation, or he may omit it, and give it in Evidence within the alia Enormia.

Matter may be laid in Aggravation of Trespass, which in it self does not bear an Action.
Show. 180.
1 Salk. 119.
1 Keb. 787.

Judgment was for the Plaintiff, Nisi Causa the first Day of next Term. Vide Newman & Smith in B. R. Pasch. 5 Annæ R.

2 Salk. 642.
Judgment pro Quer' Nisi.

D E

Termino Paschæ,

Anno 3 Annæ, in B. R.

Coram Holt, Chief Justice,
Powell,
Powys, } Justices.
&
Gould,

Ld. Raym.
1034. S. C.
Vide 1 Salk.
67.
2 Salk. 613.
Post 220.
Contra pacem
omitted in an
Indictment.
4 Mod. 145,
146, 164.
5 Mod. 425.
Fitz-G. 63,
64.
Stra. 834.

Queen *versus* Lane.

Indictment was for exercising the Trade of a Barber without Service of Seven Years. The Exception was, That it was not laid contra Pacem. And tho' Holt, Ch. Just. thought it well enough, because laid contra form' Stat'; yet by the other Three it was quashed, for every Breach of a Law is against the Peace, and ought to be so laid.

Smith *versus* Aiery.

Ld. Raym.
1034. S. C.
Vide 1 Salk.
14, 175 S. C.
22, 23, 344.
Indeb. assump'
lies not for
Money won at
Play.
5 Mod. 13.
1 Lutw. 180.
Ld. Raym.
69, 89.

In Action for Money won at Play, there were two Counts, one setting forth a special Agreement to play at such a Game, and mutual Promises of Payment, as it ought to be; the other was, That in Consideration that the Plaintiff such a Sum had won of the Defendant at Play, he promised to pay it: And here it was resolved, That an Indebit' assumpsit did not lie for Money won at Play; for that Action never would lie but where Debt would lie, and it never was heard that Debt was brought for Money won at Play.

2. That the Second Count was bad, for at that Rate one may declare, that Defendant was indebted to him, upon a certain Agreement, in such a Sum of Money, and that in Consideration thereof he promised to pay, which would doubtless be bad; for he should specially set out some Agreement whereby a Debt was raised, as for

Goods sold and delivered, &c. An Indebit' can never be upon mutual Promises; But general Assumpsits lie on mutual Promises. See Carth. 479. Skin. 196, 218.

And Holt, Ch. J. quoted a Case in my Lord Hale's Time, where it was held it would not lie upon a Bill of Exchange against the Acceptor.

And per Holt, Ch. J. There is no Way in the World to recover Money won at Play but by Special Assumpsit.

Per Cur'. Notwithstanding the Case of Eccleston *versus* Linne, in the Exchequer Chamber, it has been held frequently, both here and in Common Pleas, ever since, That this Action of Indebit' would not lie for Money won at Play.

3. They held clearly, That any Thing in the first Count, which was right, could not help any Defect in the Second; for tho' they both were put in one Declaration, yet they were as distinct as if they had been in two several Actions.

4. Tho' it was objected that this was after Verdict, whereby the Jury had found that Plaintiff had won Money of Defendant, which could not have been without a special Agreement, and mutual Promises between them; and if what the Jury must necessarily have found had been alledged, it would have been well, and therefore the Verdict did cure.

Yet tota Cur' ordered Judgment to be stayed till the Plaintiff moved further.

And Parker moved for Judgment at another Day, alledging, That mutual Hazard sufficed to raise a Debt; and for Cases cured after Verdict, quoted 1 Vent. 109, 123.

Holt, Ch. J. The Action ought to be brought upon the Agreement of the Parties. 'Tis true, when two agree to play for so much Money, that is an actual Promise; but if either win, there is no Debt arises thereupon, for nothing but a meritorious valuable Consideration can raise a Debt, and it is an Error to think that every Contract which obliges one to pay Money does raise a Debt: As if A. promise C. to pay him a Debt due to C. from B. and it be for good Consideration, A. is thereby bound to pay it, but yet it is not a Debt upon him. And if he after had come, and in Consideration that I am bound to pay you the Debt of B. I promise to pay you, an Indebit' would not lie thereupon. And Indebit' has been brought for a Tenant right Fine, which I never could digest.

Mac. 295, 296, 315. Consideration to raise a Debt. Farell. 12. Vide Hob. 18, 88. Ld. Raym. 502, 753, 1545.

And Gould quoted 2 Vent. 175. the very Case; and Methwin and Andrews's Case in the Common Pleas.

Per tot' Cur', Judgment was arrested.

L 1

Anonymous.

Judgment arrested.

Nor upon mutual Promises.

1 Vent. 53, 152.

Vide Hard.

486, 487.

3 Lev. 118.

1 Lev. 298.

Post 131.

Nel. Lut. 510.

Special Assumpsit.

V. 5 Mod. 13.

1 Lut. 180.

Caf. temp.

W. 3. 37, 107.

Caf. temp.

An. 190.

Stra. 680.

If first Count will help the second.

Vide contra.

Verdict.

V. Caf. temp.

W. 3. 5, 93, 122, 157.

Caf. temp.

An. 24, 25.

Caf. temp.

W. 3. 306, 421, 510.

Caf. temp.

Mac. 229, 300, 301.

1 Mod. Caf.

in L. & Eq.

240.

Comyns 12.

Stra. 973,

1011, 1012,

1089.

How the Action ought to have been.

Vide postea.

1 Vent. 9.

Vide antea.

1 Vent. 51.

Videt' contr.

Caf. temp.

W. 3. 16,

69, 258,

295, 324,

511, 517.

Caf. temp.

An. 147,

241.

Caf. temp.

Anonymous.

In Ejectment
Plaintiff de-
layed by In-
junction till
the Term
ended.

Vide 1 Salk.
322.

Post 288.

See Carth. 3,

204, 288,

391, &c.

Vide post

222, 309.

Caf. temp.

W. 3. 125,

398, 656.

3 Wms. 36.

1 Barnes 12,

132.

Stra. 807, 1211, 1272, 682.

Ld. Raym. 561, 1411.

1 Salk. 321.

S. C.

Ld. Raym.

1256.

Post 139.

Writ of Er-

ror no Super-

fedes till

Notice.

Vide postea

139.

1 Vent. 30.

contra.

1 Sid. 44, 45.

What Notice.

Vide antea.

Ld. Raym.

47, 405.

Caf. temp. An. 197, 273, 240, 272, 70, 78, 107.

Fitz-G. 175.

1 Wms. 685.

Comyns 321, 556, 564.

1 Barnes 56, 59, 65, 83, 275.

2 Barnes 164, 170.

Stra. 526, 867, 632, 1186.

Execution of

a Capias se-

dente Cur'.

Cro. El. 761.

Where Writ

of Error is

allowed the

same Day the

Execution is

returnable,

&c.

Caf. temp.

W. 3. 501.

IN Ejectment the Term was made for five Years; and after Verdict for the Plaintiff, he was delayed of Judgment and Execution, by Injunction in Chancery, till the Term incurred. And now it was moved to renew the Term, and the Case of Dangdell and Greenvill was quoted where it was done, and that they used to do it frequently in the Exchequer.

Cur'. We cannot do it without altering the Record.

And Gould said, they had held in Sir John Roll's Case, That it could be done by Consent, but not otherwise.

And Holt, Ch. J. said, he considered there wanted a Clock-house over-against the Hall-Gate, and the Motion was denied.

Parkins *versus* Woollaston.

Capias on a Judgment returnable such a Day, and Non est invent' returned, but not filed. A Writ of Error was taken out before the Day of Return of the Capias, but not allowed till that very Day, nor any Notice thereof to the Plaintiff's Attorney.

And the Court said, that the Opinion in some Books was, That a Writ of Error was a Superfedeas to avoid Execution from the enfealing thereof, tho' not to punish the Officer till Superfedeas comes to him; and of this Opinion is Rolle: But that the Law now is taken, that it is not a Superfedeas till Notice to the Plaintiff's Attorney, and that the Allowance thereof is sufficient Notice, or that actual Notice be before Allowance.

And they held, That if Writ be executed before Notice of Writ of Error, the Return or Perfection thereof may be after: And if a Capias be returnable such a Day, an Execution of it, sedente Cur', that Day is good, secus not. So that they were all clear, That if a Writ were returnable as of Yesterday, but not actually returned, and Writ of Error is allowed or notified to Day, yet the Return may be made and filed to Day.

And if Writ of Error be allowed or notified, sedente Cur', the Day on which the Writ of Execution is returnable, (because it comes sedente Cur', while the Writ of Execution is executable, and there cannot be well a Fraction of a Day) there it ought not to be returned or filed, but is superseded: But if it is not notified till after the Court is up, at which Time the Execution is executable, there a Return may be of the Writ, and that may be filed: And according to that Diversity it was ordered to be filed here. Per Cur'.

Note; It was upon a Sci. fa. against Bail, and no Capias against Principal pleaded.

Per

Per Holt, Ch. J. & Cur'. In Action by an Assignee of Bankrupt by Commissioners on a simple Contract, the right Way is to lay the Promise to have been to the Bankrupt; except there be an express Promise after Assignment made to Assignee. And the Way of declaring of a Promise to the Assignee is very inconvenient, and a Means to oust the Defendant of the Benefit of the Statute of Limitation: for if Goods were sold five Years before the Assignment by Bankrupt, and then the Debt is assigned, and a Year passes, Assignee declares on a Promise to himself, it will not be a good Plea to say, that the Defendant Non assumpsit infra sex Annos to the Bankrupt, for that does not answer the Declaration. And if he plead Non assumpsit infra sex Annos to the Plaintiff, it will be against him; for if there be any Promise transferred by the Act, it is only upon the Assignment; and the Intent of the Statute was only to transfer the Action, and nothing else. Indeed if after * Assignment another receives the Money, Action will lie for the Assignee upon a Promise to himself, because the Receipt of Money after Assignment is a Contract with him, and every Contract or Agreement, per Holt, Ch. J. is an express Promise, not in Word, but in Deed, which is as strong; and there is no such Thing as a Promise in Law, and that Acceptance of a Bill of Exchange is an express Promise to pay it.

Stra. 697. * If another receive the Money after Assignment. V. 2 Saund. 239. 1 Vent. 10. Comyns 205. Vide antea 29, 30, 81, 129. Ld. Raym. 365.

Action by an Assignee of a Bankrupt by Commissioners, &c. how to be laid. 2 Show. 238. 1 Keb. 1, 289. 1 Lev. 17. Faresl. 83, 96. 3 Lev. 69, 191. Carth. 149. See Skin. 21, 22, 30, 149, 270, 293. Ld. Raym. 741, 1548. Cas. temp. W. 3. 324. Cas. temp. Mac. 244, 246. 1 Mod. Cas. in L. & Eq. 171. Comyns 205. Vide antea 29,

Mrs. Dennis *versus* Doctor Lane.

SHE was a Widow, and had a Daughter who was an Heiress to 800l. per Annum, to whom the Doctor made Love; whereupon the Mother forbade him her House; yet he came at another Day, and meeting the Mother upon the Stairs, notwithstanding she then again expressly forbade him to go forward, yet he pushed on to the young Woman's Chamber in a rude Manner. This Behaviour frightened the Daughter's Mother so much, that she sent for Friends to conduct her Daughter to London; of which the Doctor having Intelligence, came with three others, and followed the Daughter, and came to the same Inn where they lodged at Night, and took up the adjoining Rooms to the Mother and Daughter, whereby they put the Mother into Fits for Fear: And the next Morning, as they were taking Coach, the Doctor assaulted the Gentleman that put the Lady into her Coach, and pursued them again that Day, and gave out that he would force the Daughter from them, so that the Mother was fain to hire Men to guard the Inn that Night. This Matter was transacted in March was Twelve-Months.

And the Doctor the last Assizes at Hereford, meeting the Gentleman who was the principal Manager of the Family, and helped to guard the Daughter to London, he being a Barrister at Law, and a near Relation to the young Lady, in his Cow, assaults him, and beats him severely with a Cane; whereupon the Judge of Assize bound him to appear the first Day of this Term in this Court: And upon all this Matter being put together, and an Oath by her, that

Doctor Lane bound to the Peace for his Rudeness to the Mother of an Heiress, &c.

Fresh Occasion given upon an old Grudge.

that she believed the Assault upon her Kinsman to be in Pursuance of the Design upon her Daughter; and that she was informed he threatened her, and endeavoured to corrupt her Daughter's Maid, to facilitate his stealing the Daughter.

Per Cur.' The Doctor's coming in that Manner, in Despight of the Mother's Prohibition, and against her Will, was good Cause to require the Security of the Peace; and so was the ensuing Behaviour of the Doctor upon the Road.

Vide antea.

Demand of Security ought to be fresh after the Fray given, &c. Caf. temp. W. 3. 565, 566, 567. Fitz-G. 268. 2 Wms. 202. 3 Wms. 103.

2. This Demand of the Security of the Peace ought to be fresh after the Fray or Cause of Fear given, and therefore if it had not been for the new Assault upon the Kinsman, the Court would not bind him to the Peace here; for the suffering considerable Time to pass before the Demand of Security, is a great Sign that the Party was not afraid. But here there being an old Offence, which one ought to give Security of Peace for, and a fresh Occasion given, which gives probable Reason to believe the old Grudge continued, the Court ordered him to give Security to keep the Peace, and took his own Recognizance in 200 l. and that of two more in 100 l. each, but refused to bind him to his Good Behaviour, because of the Length of Time, though they declared, if they had come when the Matter was fresh, they would have bound him to his Good Behaviour, and in a much greater Sum.

How the Cause of Binding ought to appear, &c.

Note; All the Cause of Binding to the Peace ought to appear in the Articles which are sworn by the Party, and read in Presence of the other; and one that gives Security of Peace, must stand upon his Recognizance for a Year and a Day, and the Condition of Recognizance is to keep Peace towards all the King's Subjects, and particularly towards the Person that demands it.

Shuttle *versus* Wood.

Debt upon a Recognizance given in C. B. Vide 2 Salk. 564, 600, & 659. Shuttle *versus* Wood. Ld. Raym. 156, 157, 721. Caf. temp. W. 3. 650. Caf. temp. An. 2, 253. 1 Mod. Caf. in L. & Eq. 340. 1 Barnes 50, 76.

DEBT upon a Recognizance given in Common Pleas brought in this Court.

And Raymond moved to have the Action discharged, for that the Defendants had surrendered the Principal even before the Action commenced. And now by a Rule of Court here, if Debt be brought upon a Recognizance of this Court, the Defendant has eight Days in full Term to render the Principal, whereby the Defendants have now equal Advantage in the Case of Debt, and Sci. fa. upon a Recognizance.

Vid. Hob. 195. Aleyn 12. 1 Cro. 312.

To which it was answered by Dee, That tho' that be a Rule in this Court, yet there is no such Rule in the Common Pleas; and this being upon a Recognizance of the Common Pleas, we must do in it as would be done there if the Action were brought there.

And so said the whole Court, That he should have the same Sauce here as in the Common Pleas. And formerly they would not suffer an Action upon a Recognizance in this Court, because of the greater

Mischief

Mischief it would be to Defendant than a Sci. fa. But sure the Action was always well maintainable, and our Rule is in Avoidance of that Mischief.

And Raymond was directed to enquire how the Course of Common Pleas was, for they must guide themselves thereby here in this Case.

Per Cur'. Antiently there could be no Proceedings on Bail-Bond till the next Term, and 'tis a great Grievance to put it in Suit till after a convenient Time, tho' it is otherwise practised in the Common Pleas by the Attornies, merely to make Work for themselves.

Of Proceed-
ings upon
Bail-Bonds.

Per Cur'. A Will, when clear, and the Intent of the Parties fully appears, is as much to be favoured as any Heir at Law.

Will to be
favoured.

Southers's Case.

Southers, Barshal, was complained against by Whitacre, for that he wilfully suffered a Person brought up upon a Habeas Corpus, and committed in Court, to escape.

Vide post
183.

And, per Cur'. If one be in Custody upon a criminal, and also upon a civil Matter, and he would move himself up by Habeas Corpus, there ought to be but one Habeas Corpus either of the Crown-Side or of Plea-Side, and both Causes ought to be returned.

But one Hab'
Corp' tho' in
Custody upon
a criminal
and also a ci-
vil Matter.

2. The Barshal, without more ado, is obliged to take Notice of all Commitments in Court. Vide of Commitments, 1 Salk. 272, 273.

Domina Regina versus Town of Clitheroe.

A Mandamus was to the Bailiffs of the Town, to swear in such and such Persons into the Office of Bailiffs.

Vide 2 Salk.
431, 432,
699, 701.
The old Bai-
liffs of a
Town oblig'd
to return a
Mandamus.

And Brotherick moved, that they should not be obliged to make a Return, for they could not well do it, because the Writ was not directed to them in their natural Capacities, and by their Names, and two other Persons were Bailiffs, so that it would be hard to put them to make a Return.

Ante 25.
Inst. Leg.
194.
Ld. Raym.
848, 849, ...
885.
Caf. temp.
W. 3. 126.
251, 322.
Stra. 640,
808, 895.

But per Cur'. If you when Bailiffs have sworn in others, who were not rightly chosen, you notwithstanding continue Bailiffs still, and therefore ought as such to make a Return to the Queen's Writ; and they were ordered to make a Return.

And here Holt, Ch. J. said, They might amend the Writ any Time before it was returnable; but they of the other Side could not, except to quash it till a Return thereto were made and filed.

Mandamus,
when amend-
able, &c.

Adams *versus* the Tertenants of Savage.

Salk. 40. S. C.
S. C. Ld.

Raym. 854,
1253.

Post 199,
& 226.

2 Salk. 601,
679.

Farell 15.
Sci. fac. by

Administra-
tor to warn

in Tertenants
upon a Judg-

ment obtained
by the Inte-

state against
S. at *West-*

minster.
Vid. post 200,

206, 226.
Moved in

Arrest of
Judgment.

THE Plaintiff brought a *Sci. fac.* against the Defendants, reciting a Judgment obtained by his Intestate against Savage in such a Term and Year in the King's Bench at Westminster, commanding the Sheriff to warn in all the Tenants of Lands whereof Savage at the Time of the Judgment was seised; and in the Count in the End of the Writ he shews, that his Intestate died so, &c. and Administration of all his Goods and Chattels were committed to him the Plaintiff by J. S. Archdeacon of Dorset in the County of Dorset, to whom it did belong to grant it. The Tertenants returned, traverse the said Savage's being seised of any of the Lands whereof they are returned Tenants, and found against them; and last Easter was Twelve-months, Darnell, Serjeant, moved in Arrest of Judgment, That the Plaintiff in his Writ shews he has not Right to receive the Judgment, for this Judgment is Assets here at Westminster, where the Record lies; and the Administration committed by the Archdeacon of Dorset, which he shews for his Title, is utterly void, here being Bona notabilia out of his Jurisdiction.

Administra-
tion by the

Archdeacon
of D. cannot

intitle the
Plaintiff upon

a Judgment
obtained at

Westminster.
1 Lut. 399,

400.
1 Salk. 39,

40.
Carth. 148.

3 Mod. 324.
Post 241,

242.
Ld. Raym. 562.

Caf. temp. W. 3. 107, 385. Caf. temp. An. 223. Caf. temp. Mac. 272. 1 Mod. Caf. in L. & Eq. 244, 225. 1 Wms. 767. 3 Wms. 349, 370, 371. Comyns 17, 18. 2 Barnes 137, 142. Sira. 781, 716, 412, 631.

To this, Eyres offered for Answer; That though the Court will judicially take Notice of Ecclesiastical Divisions, as that there are two Provinces, and so many Dioceses in every Province, as they will do of all the several Counties of England; yet they cannot take judicial Notice within what Diocese such or such a Place is, no more than they will within what County such a Hundred is: So they cannot take Notice here but that the Archdeaconry of Dorset is within the Diocese of London, and then this may be an Administration well committed.

2. Since we have averred, That it belongs to him to grant it, and that he did grant it, you will give him that Credit as to believe that he did it well, at least till the contrary appear, which cannot be here.

How Arch-
deacons may

grant Admin-
istrations.

2 Mod. 65.
5 Mod. 225.

Ld. Raym.
138, 453.

How to be
pleaded.

But per Cur': We that sit here, and hold the Queen's Courts, are bound to take Notice under what Ecclesiastical Jurisdiction we are; and if so, we must see that we are not under the Archdeacon of Dorset; and by Consequence, an Administration granted by him cannot intitle one to bring Action upon our Judgment: And Archdeacons as such have no Power to commit Administration, though most in England do it, but not quatenus Archdeacons, but by a prescriptive Right, and sometimes they do by Peculiars, and sometimes by themselves; and in those Cases you must plead, *cui Administratio in hac parte pertinuit*: And here the Administration is absolutely void, and so would be if committed by the Bishop, whose Archdeacon this Ban is. And suppose, as 'tis urged, we cannot take Notice but that the Archdeaconry of Dorset is Part of the Diocese of London; yet at least we must take Notice that the Place where we sit here, is not of it: And the Administration quoad this Judgment is void.

And

And this Term Brotherick moved for Judgment upon this Ground, viz. That tho' the Plaintiff has shewn a bad Title, yet the Writ of Sci. fac. being good, and he calling himself Administrator, and the Defendants not traversing, or taking any Advantage of the Invalidity of the Administration, but pleading to the Merits, they thereby admit the Person intitled to sue, and shall not come when the Right is tried against them, to controvert what they have before waived to insist upon; but admitted it: And here if we had not said any Thing, by whom Administration was committed to us, and they had thus pleaded over, it had been good: Vide Style 383, & 2 Mod. 65. Trin. 12 W. 3. in this Court, *Gidley versus Williams*.

If the Defendants by their Plea have not admitted the Administration to be good.

Administrator brought Debt upon Bond to Intestate, setting forth, That G. was Administrator of such an one, and that the Defendant did not pay to the Testator in his Life, or to G. the Administrator, since his Death; Non est factum: And Verdict for the Plaintiff, and Execution, that it did not appear Administration was committed to the Plaintiff.

Vid. Sty. 283.
Cro. Jac. 10.
1 Sid. 238.
2 Vent. 84.

But per Cur': That would be a fatal Exception upon Demurrer, but is helped by your pleading over, Non est factum; whereby you admit him capable to sue: And as this Case stands, if we had said only, that we were Administrators, or that Administration was committed to us, without more we should have Judgment; then there being enough said, that Administration was committed to us, the other Words, per Archdeacon of Dorset, shall be rejected; and for rejecting Words that would vitiate Matter which was well without them, he quoted 3 Cro. 697. Lease was to begin after Death of Thomasine Chapman and Thomas Chapman; and alleged, that præd' Thomasine Chapman and Thomas Chapman were dead; and held, that because præd' was enough, and the Addition of Surname was vain, therefore would not vitiate: Sir Thomas Jones 219. Dyer 240. Pl. 56. Parson made a Lease, and was deprived by his Ordinary, from which Sentence he appealed to the Archbishop after Deprivation and before the Appeal, another is become Parson, and makes a Lease: And in the Contest between the two Lessees, the second pleaded the Deprivation of the Lessor of the first. To which they replied, That he had appealed from the said Sentence to the Archbishop in Cur' Prærogativa sua de Arcubus: And though the Court of Prærogative be not the Court of Arches, yet the Court held, That it sufficed to shew an Appeal to Archbishop's Prærogative Court, and the rest, rather than vitiate, should be rejected: Vide Palm. 74. 2 Lev. 234. In Avowry for Rent, Avowant makes Title as Grantee of Reversion, without shewing Attornment. Defendant pleads Rien arreare; and held, That though upon Demurrer the Want of shewing Attornment would be fatal; yet it would be well enough now, because the Defendant admitted it by his Plea.

If Administration do not appear in Narr', 'tis fatal on Demurrer.

If Words that will vitiate, ought to be rejected.
Hob. 117.

Upon an Appeal in Cur' Prærogat' de Arcubus.

In Avowry, and no Attornment shewn.

But

But Note; There is another Reason given for that Judgment, viz. That it was after Verdict, and so cured by the Statute; and he said, the Judgment must be upon the Writ and Return, and not upon the Declaration; for by pleading over, they allowed that to be well.

Obj. That the Plaintiff has shewn but a bad Title.

Vide antea.

To which it was answered by Darnell, Serjeant, That here they not only not shewed that they had a Title, but that they had a bad one: They took upon themselves to shew a Title, and have shewed a bad one; and when they shewed and set out a bad one, the Court cannot intend that they have a good one; but to the contrary, that they have shewed the best they can. And he utterly denied, that a Mistake in setting out that which was not necessary to set out, would not hurt; for if a Man will take upon him to plead a general Act of Parliament specially, and fails therein, though he need not have set it out specially, yet it will spoil all: And if they have Judgment in this Case, the Defendant would be liable to the Action of an Administrator of Archbishop.

Vide antea.
That if he had only generally alledged himself Administrator, &c. it might have been admitted.
Caf temp.
W. 3. 100,
443. 537.

Holt, Ch. J. If the Plaintiff had not set forth what Kind of Administration he claimed by, but only generally alledged himself Administrator of the Goods and Chattels of the Intestate, and that the Defendant had not put you upon shewing it by craving Oyer of the Letters of Administration, as he might have done, but pleaded over; that had been an Administration of the Plaintiff's having a Right of shewing as Administrator, as he had alledged. It is true, the Writ need not mention any Thing of Administration's being committed to the Plaintiff; but the Course is, to suggest upon the Roll after the Writ is come in, that Administration was committed to him, and to profer the Letters of Administration to shew it: But in Debt, or Sci. fac. on a Judgment here at Westminster, which is local, you make yourself Title as Administrator by Vertue of Letters of Administration by Archdeacon of Dorset, and without Doubt that is no good Title; and when you yourself affirm this to be your Title, how can we intend you have another? For of your own shewing, this is your Title, which is manifestly bad? And there is a vast Difference, where a Title does not appear fully for the Plaintiff, and the Party will not controvert with him about that, for there it may be well presumed: If Party were not well satisfied of Plaintiff's Title, he would have insisted on it in due Time, and where the Plaintiff himself shews he has no Title, for there the Court has no Room for Intendment.

Where the Matter is indifferent, and Party pleads over, the Court will intend it well, but this shewing is absolutely void.

Tota Cur' accord. That where the Matter is indifferent to be well or ill, and Party pleads over, they will intend it well; and all the Cases put by Brotherick were, where it was indifferent: And this properly is not an Imperfection in shewing of Letters of Administration, but it is shewing such as are absolutely void as to the Intestate's whole Estate, because there are Bona notabilia.

Et

Et sic per tot' Cur' Jud' pro Defend': But doubted what Judgment to give, to quash the Writ, or bar the Action; and took Time to consider of that: And after, before any Judgment entered, the Defendant moved for Costs upon the Statute of 8 & 9 W. 3. the Words whereof are, That after Nonsuit, Discontinuance or Verdict for Defendant, he shall have Costs.

Judgment for Defendant, but doubted what Judgment.

And it was insisted on by Darnell, Serjeant, That if this had been a special Verdict till Court had determined the Point, it was not a Verdict for either Side; but now that they were of Opinion, Plaintiff ought to have no Judgment, it would be the same as if it had been a special Verdict, and then it would have been for the Defendant, and it is within the Dischief remedied by the Statute, for here the Plaintiff knew, and shewed he had no Right to give the Defendant Trouble: And if this Sci' fac' had been brought by him as Administrator of J. S. and had recited a Judgment obtained by J. N. should not we have Costs?

Holt, Ch. Just. No; Because out of the Words of the Statute, if Plaintiff had Verdict, as here: And our Judgment may be, licet Verdict be for Plaintiff, quia apparet Cur', that he has no Right to recover: Ideo confid' quod nil capiat per Billam; and adjudged there should be no Costs. Vide Residuum postea 199, 226.

In a Case where H. M——, formerly an Attorney of the Court, (now Counsellor at Law) was accused of foul Practice in his Profession: The Court said, Tho' he be now a Counsel, yet perhaps that will not discharge him from being an Attorney still; and then we may get his Demands taxed as such: And does any Body think but a Counsellor at Law is a kind of Minister of Justice and Right, and, as such, punishable for Misbehaviour in his Profession?

A Counsellor, formerly an Attorney, accused of foul Practice.

And Holt, Ch. Just. said to him, Will you have the Point tried, Whether a Counsellor at Law may commit Extortion? And with respect to the Circumstances of this Case, said, This was dragooning of People out of their Money.

Domina Regina versus Best & al.

THEY were indicted for Conspiring to get Money unjustly, &c. from one A. and to bring about that wicked Purpose, falso to charge him to be the Father of a certain Bastard-child, &c. And that in pursuance of such Conspiracy, they did falso charge and affirm him to be the Father of it: And the Exception was taken, That it did not aver that he was the Father of it.

Per Cur', The Oist is the falso, conspiring to charge falsely; and it is said further, that they did falso charge, &c. and an Indictment lies for the Falshood before the Party is acquitted of it; but Case lies not

Ld. Raym. 1167. S. C. 1 Sal. 174. S. C. Post 185. That an Indictment for Conspiracy lies before Acquittal, but Case lies not till Acquittal. Vide 1 Salk. 13, 14, 15. 2 Mod. 152, 306. Post 169, 185. Ld. Raym. 81.

Conspiracy
ante 100.
Post 169, 185.
Carth. 417.
Skinner 44.
Caf. temp. W.
3. 248, 255,
454, 542.

till Acquittal: And this was said to be two frequent an Offence to be quashed upon Motion, that they would no more quash it than they would for Barretry, or keeping a Bawdy-house; and it was denied to be quashed.

Kent *versus* —.

Error of a
Judgment in
Trespas,
whereas it was
in Case a great
Diversity.

ERROR of Judgment in Trespas Vi & Armis in the Common Pleas, and the Writ was of a Judgment in Pl. Transgr' sup' Cas'.

Per Cur', It is no good Writ to remove the Record; for though Trespas generally, and upon the Case, may be laid Vi & Armis, yet there is very great Diversity between their Natures; the one is grounded upon the very unlawful Act, the other upon the whole Circumstances of the Case.

Vi. Hob. 118.
8 Co. 160. b
Hob. 129.

But it was agreed, That if right Instructions had been given to the Officer that made out the Writ, and that were made out by Affidavits, they would amend by the Statute of 8 H. 6. c. 12. Sect. 2.

And per Cur', The Defendant cannot move to quash the Writ till it be entered on the Roll, and he appear to it; and the Writ was quashed Nisi.

Interest upon
a Bill of Ex-
change.
Caf. temp.
Mac. 37.
Stra. 649.

Per Cur', Interest upon a Bill of Exchange commences from Demand made; and therefore if there was no Demand made till Action brought, Defendant may plead Tender and Refusal, and Uncoreprist, and so discharge himself of Interest; but if it be the Defendant's Fault that Demand could not be made, as if he were out of the Kingdom, there want of Demand ought not to prejudice the Plaintiff. Vide postea.

Lewis *versus* Jones.

Writ of Error
upon a Judg-
ment in Wales.

UPON Writ of Error of a Judgment in Wales, the Placita were, &c. Ad magnam Sess' Dni' Regis, &c. tent' coram A. & R. Just' Dnæ' Reginae, and held a fatal Variance; but doubted, whether if they would amend below, a Certiorari ad Inform' conscient' ought not to go.

And at another Day, a Motion was made by Williams for a Certiorari, that they might amend below, and certify it right up; but it appearing to the Court that a former Writ of Error had been brought, and a Certiorari and an Amendment of such Faults as had been then discovered, and that this was the second Writ and Faults, still they said, they would consider well of it before they would send any more Certiorari's: For when would there be an End at this Rate? And gave Leave to move again, and it was after granted, Absente Holt, Ch. Just.

Wells moved for a Mandamus against Golson and others, Justices of Peace of Ipswich, to issue their Precept to inquire of a Force, upon Affidavits of a forcible Entry: And it was granted.

Mandamus to inquire of a forcible Entry.

Parkins *versus* Woollaston.

DEBT upon a Recognizance against Bail, and Plea that there was no Capias against the Principal: Replic', averring a Capias prout patet per Record', in the Common Pleas: Rejoinder, that there was a Writ of Error taken out, and allowed before the Capias was returned and filed; and on Demurrer adjudged, That the Rejoinder was a Departure from the Plea; for it is a new Matter, which does not agree with or enforce the Matter of the Plea, for the Plea is, that there was no Capias, and the Rejoinder says, there was a Capias, but it was superseded, and there is a great Difference between no Capias and a Capias superseded, for the Superseding does not make it null, or no Capias, but only suspends the Fruit or Effect of it; and one must distinguish between the Writ it self, and the Effect of it. And this Capias, tho' superseded, is nevertheless a Writ, and therefore if after Allowance of it, the Sheriff, before a Supersedeas served upon him, execute it, the Writ shall excuse him, which a void Writ could not do: And if the Writ of Error had been quashed before the Return of the Capias were out, then this Writ might be well executed. And the Case, 2 Lev. Vere & Smith, was allowed for Law; for it was Debt upon Bond to account for Money. Defendant pleads, That he did account: Plaintiff replies, That the Defendant had received 20 l. at such a Time, of which he gave him no Account. Defendant rejoined, That he was robbed of them, whereof he gave Notice to the Plaintiff; and sure that maintains his first Plea, for it was a legal Account of them: Et Jud' pro quer' per Cur'.

Ld. Raym. 1256.
1 Salk. 321.
S. C.
Vi. ante 130.
Debt upon a Recogn' against Bail.
Plea, that there was no Capias against the Principal.
Repl', that there was.
Rejoin', that a Writ of Error was allowed before the Return of the Capias.
Cap. &c.
Ld. Raym. 342, 157, 1097, 1177, 1259, 1452.
Vi. antea 130.

Note; It seemed ill for another Reason, because the Allowance of a Writ of Error before the Return and Filing, if it were returned before, did not obstruct the Filing. Vide antea 130. Vide postea.

Leonard *versus* Stacy. Vide ante 68.

TRespass for entering into the Plaintiff's House, and taking away his Goods: Defendant Justifies by Virtue of a Replevin out of the Sheriff's Court in London, and a Precept thereupon to J. S. an Officer, and Defendant came in Aid of him.

In Trespass the Defendant justifies in Aid of the Officer upon a Replevin.

Ld. Raym. 217, 219, 309, 310, 984, 1017, 1019, 1020. Stra. 509, 1184, 1238.

Plaintiff replies, That before the taking away the Goods, he claimed Property in them, and gave Notice thereof to the Defendant; and the Question upon a special Verdict was, Whether the Taking away after Claim of Property, and Notice thereof, did not make him a Trespasser ab initio?

Plaintiff replies by a Claim of Property, &c.

And

And held per tot' Cur', That he was a Trespasser ab initio ; for tho' the Claimer ought to be to the Sheriff or Officer, and that a Claimer to a Person that comes to Assistance be not enough to the making the Execution illegal, if the Officer does not desist ; yet if it be notified to him that comes in Aid that Claim of Property is made, he at his Peril ought to desist.

Jud' pro Quer' per tot' Cur'.

Heins *versus* Hancock.

Denomina-
tion in Eject-
ment certified
from Ireland
upon a Writ of
Error.

ERROR of a Judgment in Ejectment in Ireland ; and assigned for Error, That the Denomination of one of the Parcels was a [Kneave] of Land, which was said to be an insensible Word ; but upon Certificate of the Chief Justice of the King's Bench in Ireland, That it was a Denomination well known there, Judgment was affirmed.

If a Clergyman
without Cure
may have a
Writ to dis-
charge him
from being
Overseer, &c.
Ld. Raym.
265.
2 Stra. 1107.

Note ; A Writ of Privilege was moved for to have a Clergyman, who appeared to have no Cure of Souls, privileged from the Office of Overseer of the Poor.

And tho' Holt, Ch. Just. seemed against it, because by him their Privilege of Exemption was only extendible to their Spiritual Revenues, and if in any Case they were personal, it was only from Common Law Offices, and specially if they were without Cure, as here ; yet the other three Justices were strongly against him : But however, for his Lordship's Satisfaction, desired it should be stirred again, 1 Lev. 303. Archdeacon of Rochester had such a Writ to discharge him from the Office of Expenditor for Rumney-Marsh.

1 Vent. 105.
1 Mod. 282.

Per Cur', If a Witness come voluntarily to give Evidence without a Subpoena, Consideration shall be had of the Party's Charge in maintaining him.

Domina Regina *versus* Pugh & al'.

Inquisition ta-
ken for a Riot
made contra
formam Stat'
generally, and
good.

AN Inquisition was taken before two Justices of the Peace against them for a Riot, upon the Statute of 13 H. 4. c. 7. And the Caption was, Inquisitio capta pro Domina Regina in Com. H. sup' Sacrum, &c. duodecim probor' & legalium hominum, &c. qui adtunc & ibidem impanelat' Jurat' & Triat', &c. ad inquirend' de Riotis contra formam Stat', generally.

Brotherick took Exception, That in the whole Inquisition there was not a Word of the Statute of 13 H. 4. and quoted Crompton Just. — & Lamb. That Precedents on this Statute did particu-
larly

particularly describe the Statute, and shewed the whole Proceeding of the Justices to be precisely pursuant to it. Sed non allocatur. For per Cur', The Justices have Power to inquire of all Riots and Routs whatsoever by this Statute; and if a forcible Entry be made by three, (for fewer cannot commit a Riot) the Justices may inquire of it by the Statute of 13 H. 4. and fine according to the Statute of 8 H. 6. c. 9. and award Restitution; for a subsequent Statute that gives a greater Punishment, does not take away the Power given by a precedent Statute: And the Inquisition may be taken any where else as well as upon the Place; but if the Information given to the Justices be, that the Riot continues, they ought to go and convict them, and record it upon the View, under Penalty of 100 l. but they may inquire, where the Riot does not continue, any Time within a Month.

Justices Power
in Riots, &c.
2 Salk. 593.
594, 595.
3 Mod. 141.
Hawk. P.C.
155.

Where such
Inquisition
may be taken,
&c.

But per Holt, Ch. Just. If they will not inquire within the Month, they forfeit the Penalty; but notwithstanding, they may inquire after, viz. when they have issued a Precept within the Month to inquire.

Justices to in-
quire within
the Month.

And here per Cur', If a Number of People meet to do an unlawful Act, and after they have met, they do it not; that is an unlawful Assembly, but not a Riot.

Vid. Hob. 92.
Ld. Raym.
965, 1210.

2. Also, if they meet to do an Act that in itself is not lawful, but is not an Act of Violence or Force, and they do it, that is no Riot, but an unlawful Assembly; and upon this Foundation the assembling in Conventicles in the Time of King Charles II. by the better Opinion was held no Riot.

Distinction be-
tween a Riot,
and an unlaw-
ful Assembly.
Skinner 119.
Carth. 383.
2Sa. 523, 595.

An Affidavit was made of a Rescous of one taken by mean Process, and thereupon an Attachment moved for.

Rescous upon a
mean Process.
Vid. post 173,
210, 211.
3 Lev. 46.

Per Cur', Upon a Return of Rescous it would go of Course.

But Holt, Ch. Just. would distinguish between this and the Case of Rescous upon Writ of Execution; for there the Sheriff cannot return a Rescous, and therefore the Court can have no other Ground for an Attachment but Affidavits, and ought to be contented there with; but here a Rescous might be returned, which being Matter of Record, and by Consequence a better Motive, ought to be given to the Court; yet the Court seemed against him, and Rule to shew Cause why Attachment should not go.

Rule for an
Attachment
(upon an Affi-
davit) *Nisi*
Causa.
Ld. Raym.
589.

Touching the Difference of Rescues on mean Process, and those of Persons taken in Execution, see 1 Cro. 33, 77, 175. 2 Cro. 289, 360. Pop. 189. 3 Bul. 198. Dyer 212, 241. 3 Lev. 44, & 2 Sal. 586. Post 220. See also Inst. Leg. 176, 394 to 400. See also 1 Hawk. ch. 65. Sect. 2, 11, 18 to 23.

Rule for an
Attachment
(upon an Affi-
davit) *Nisi*
Causa.
Ld. Raym.
589.
Caf. temp. W.
3. 10, 94,
247, 556, 557.
Caf. temp.
An. 64.
1 Mod. Caf.
in L. & Eq.
110, 342, 240,
241, 357.

3 Wms. 484. 1 Barnes 307, 308. Stra. 531, 1226.

1 Salk. 315.
S. C.

Smith *versus* Harmon.

Plaintiff as
Administrator
sues Defendant
as Executor,
the Intestate
dying before
Return of Writ
of Inquiry up-
on an interlo-
cutory Judg-
ment.

Vide 1 Keb.

55, 310, 477.

2 Keb. 548.

1 Sid. 131.

Raym. 16, 55.

3 Keb. 160.

1 Salk 8, 42.

Q. Farell. 64.

65, &c.

Ld. Raym.

40, 263, 589.

591, 679.

1049.

1 Vern. 119.

474.

THE Plaintiff as Administrator to J. S. sues out a *Sci. fa.* against the Defendant, setting forth, That his Intestate sued the Defendant in this Court in an Action, &c. and that in that Suit *taliter processum fuit*, that he recovered Damages against him; but that before the Return of a Writ of Enquiry of Damages, the Intestate died; That Administration was committed to the now Plaintiff, and the Writ commands the Sheriff to summon the Defendant to shew what he can, why Damages should not be assessed, and Judgment final for the Administrator, according to the late Statute of 8 & 9 W. 3. cap. 11. being An Act for preventing frivolous and vexatious Suits. Defendant is returned summoned, and appears, and as to the Assessing of Damages, says nothing against that; but says, that when they are assessed, that Plaintiff ought not to recover them, for that his Testator (for he was an Executor, and sued as such) did owe such a Sum by Bond to A. B. who sued the now Defendant upon the said Bond, and recovered against him, and averred it to be a just Debt, and that he had Assets but to such a Value, which, &c. To which Plea the Plaintiff demurs generally.

And now Pengelly, Serjeant, maintained the Demurrer for Two Reasons:

1. This Matter is not pleadable within the Intent of the Statute, for the Act never meant to give a Defendant Leave to plead any Thing in Bar of the original Action, but only to put him in the Room of the first Defendant, or to enable such a Continuance of the Suit as might have been if neither Party had died, and saves the Defendant the Advantage of any Error in Law on the Face of the former Proceeding, in order to stay final Judgment, as may appear by the very Words of the Act, which are: If any Plaintiff happen to die after an Interlocutory Judgment, and before final Judgment obtained therein, the said Action shall not abate by Reason thereof, if such Action might be originally prosecuted or maintained by the Executor or Administrator of such Plaintiff. And if the Defendant dies after such interlocutory Judgment, and before final Judgment therein obtained, the said Action shall not abate, if such Action might be originally prosecuted or maintained against the Executor or Administrator of such Defendant. And the Plaintiff; or if he be dead after such interlocutory Judgment, his Executor or Administrator, shall and may have a *Sci. fac.* against the Defendant, if living after such interlocutory Judgment, or if he died after, then against his Executor or Administrator, to shew Cause why Damage in such Case should not be assessed and recovered by him or them; and if such Defendant, his Executor or Administrator, shall appear at Return of such Writ, and not shew or alledge any Matter sufficient to *arrest the final Judgment*, &c. that thereupon a Writ of Inquiry of Damages shall be award-

Words of the
Statute 8 & 9
W. 3.
Vi. 1 Salk. 8.

awarded, which being executed and returned, Judgment final shall be given, &c.

So that the Statute in this Case does only call in the first Defendant's Executor or Administrator to enable him to do whatever his Testator or Intestate might have done, had he lived; and if he had lived, he could not have offered such a Plea as this; Ideo the Statute makes Use of the Word Arrest of Judgment, which is a known Term in the Law: And when an Act of Parliament makes Use of such a Term generally, it shall receive the same Sense that the Common Law takes it in, and no other. Hob. 97, 98.

By the old Books, after Verdict, the Defendant had a Day given him to plead in Arrest of Judgment; and this was done formerly, like other Pleadings, Ore tenus at the Bar, but was always of some Error appearing on the Face of the Record: And if at such Day the Defendant had made Default, then any Body, as Amicus Cur. might move in Arrest of Judgment such Matter as the Party himself might have pleaded. Vide 5 H. 7. 23. a. Ro. Ab. 716. 12 H. 4. 24. Raft. Brief, a Precedent of a Plea in Arrest of Judgment. Co. Ent. Err' 95. Vide 1 Vent. 347. which does not at all seem for him. Yel. 152. 2 Cro. 220. seems more to his Purpose.

Vi. ante 142.
1 Sid. 131.
1 Mod. 5, 6.
1 Vent. 235.
1 Keb. 447.
2 Keb. 594.
3 Keb. 160,
466.

The ancient
Manner of
Pleading in
Arrest of Judgment.
Caf. temp.
Mac. 311, &c.
Hob. 162.
Vi. antea 24.
1 Cro. 514.
1 Keb. 55, 310.
1 Leon. 263.
4 Co. 39.
Hob. 124.
1 Vent. 230.

Obj. If he cannot plead this Plea, it will be of great Mischief to him, for he cannot plead this interlocutory Judgment to the Bond, there being nothing yet certain; and if he cannot plead the Judgment upon the Bond to this, the final Judgment will be a Confession of Assets, and a Devastavit in him.

What Mischief
may happen if
this Plea be
not allowed.

To which he gave these two Answers:

1. It would not be a Confession of Assets. Hob. 178. 1 Ro. Ab. 929. pl. 3. If Executor plead plene Administravit, and Plaintiff reply Assets, and Defendant Pelicta aerificatione cognovit Actionem, nec quin ipse detinet, this is no Confession of Assets.

2. He is not privy to the first Judgment, but it is given upon the Default of his Executor, and not his; and besides, if by the Statute he cannot plead this Plea, without Question the not doing of an Impossibility will not make a Man guilty of a Devastavit.

2. He argued, that the Matter of the Plea, in case the Defendant might plead in Bar, within the Meaning of the Statute, was not a sufficient Bar; for the Plaintiff's Right now being upon Record, is of a superior Nature to a Debt by Bond, and therefore Debt by Bond recovered since the interlocutory Judgment is no Plea to it; for since the Statute, by the Judgment the Nature of the Debt continues altered; but at Common Law, if the Nature of the Debt was at all altered by the interlocutory Judgment, yet by the Abatement of the Suit before final Judgment, it reassumed its first Nature again: But it is not so now since the Statute, for now the Party cannot resort to the first Remedy by Action. Vide 3 Leon. 68. per Dyer & Manwood, That the Award of a Writ of Inquiry is a Kind of a Judgment: And he relied much on Burnett and Holden's Case. 1 Lev. 227. Ray. 210. None argued of the other Side.

If now the
Plaintiff's
Right be of a
superior Na-
ture to the
Bond Debt.

The Meaning
of the Statute.
Prec. Chan.
223.

Holt, Ch. Just. This Statute has now established the interlocutory Judgment, and it never was the Intent of it that the Executor should say more than the very Party might have said, and its Meaning was to put the Executor in the same Condition with the Testator; and now he pleads in Bar of the Original Action, which lies not in his Mouth to do.

'Tis no Mis-
chief to Exe-
cutor if Judg-
ment be *pro*
Quer.

The next Thing is, where is there any Mischief to the Executor? None at all, for Judgment shall here be given, that the Plaintiff shall recover *de Bonis Testat'*, and in like Manner of Costs; for the Judgment here shall not be as usually, of Costs of Goods of Testator, *si, ac si non* of Executor's Goods; but such Judgment shall be as shall only affect the Assets, because it shall be just as if Judgment final had been against the Testator in his Life-time. Then if he be excluded from pleading in this Case, he does not admit Assets, so he is as much at large as if the Judgment had been actually compleated in the Testator's Life; and sure the Debt, the Right whereof now appears on Record, is of higher Nature than Debt upon a Bond, tho' the Quantum of it be not ascertained. If an *Indebit'* be brought against an Executor, and he pleads that his Testator did covenant several Things, and that the Covenant was broke, and that the Damages thereof amount to so much, and shews that he has no more Assets, it will be a good Plea, tho' the Damages be not certain any more than here.

Vi. 1 Leon. 44.
2 Keb. 223.
1 Lev. 165.
3 Lev. 114.
Where volun-
tary Payment
by an Executor
is a *Devastavit*.
2 Vern. 299,
300, 117.
Prec. Chan.
188, 534.
Cas. temp. W.
3. 291.
Cas. temp.
Mac. 428,
495, 496.
Ld. Raym.
1320.
Fitz-G. 77, 78.
2 Wms. 296,
447.
3 Wms. 400,
117, 330.
Cas. temp.
Talb. 217, &c.

If an Executor voluntarily pay a Statute, before a Judgment had against his Testator, it is a *Devastavit*; but if, after Death of the Testator, Execution be taken out and executed, he may plead it to a *Sci. fa.* upon the Judgment, because he could not hinder Execution: and that is, And. 208, 209. And he put the Case of Burnet and Holden: Testator had Judgment against him upon *Assumpsit*, and *Sic. fa.* against Executor thereupon. He pleads a *Verdict* against his Testator in his Life-time, and Judgment against him as Executor, upon 17 Car. 2 and Payment thereof, and held good Plea, and that now the Judgment was to be considered as given against the Testator himself. And Hale there said, If the Judgment had been at Common Law against the Testator himself, after his Death it had been well pleadable by Executor till reversed, for the Executor could not falsify it in Pleading.

And Powell, agreeing in omnibus, put this Case in Account: Judgment is, *Quod Def. computet, Sci. fa.* lay for Executor before this Statute, yet the Party could plead nothing against the first Judgment.

That this *Sci.*
fa. is not so
good as it
should be.

And per Holt, Ch. Just. This *Sci. fa.* is not so good as it should be, for it should be *Sci. fa. ad audiend' Judicium*, that is, giving them Day to come and hear Judgment of the Court.

And

And at another Day, none appearing for the Defendant, Plaintiff, per tot. Cur. had Judgment nisi in three Days, and the Rule was after made absolute, Holt, Ch. J. declaring, that the second Point was not in Question here, but that they were very clear upon the first; and that the Executor could not plead a Release here tho' to himself, and therefore the not Pleading of it would not be a Devastavit.

Vide ante
143, 144.
3 Lev. 114,
115.
1 Mod. 179.
Vaugh. 94.

Per Holt, Ch. J. The Gaol-Delivery of Middlesex is held with- Judgment in the City of London by Prescription, but the Oyer and Terminer *pro Quer, &c.* is not so, but at Hicks's Hall in the County of Middlesex; so that Gaol Delive- tho' of common Right the Gaol-Delivery ought to be within the ry of Middle- proper County, yet Custom and Usage Time out of Mind may sex, how held in London, &c. make it otherwise.

Per eund. Commissioners to assess Taxes cannot compel the Inhabitants to come before them out of the Country; but if they will come voluntarily it will be well. An Ordinary commits Administration out of his Diocese or Province: Ordinary of Ireland may commit Administration here in England of Goods within his Diocese.

Authority of
Commission-
ers to assess
Taxes.
Ld. Raym.
562, 856.

Domina Regina versus Leich.

HE was indicted for a publick Nuisance to Billingsgate-Dock: The Indictment did set forth, That Billingsgate-Dock was a common Dock, to which all small Ships coming with Provision to the Bakers of London might come, but that no great Ship ought or used to come there: That notwithstanding the Defendant brought a great Ship of 300 Tun into it, ad commune Nocumentum of all the Queen's Subjects, &c.

Defendant in-
dicted for a
Nuisance, by
bringing a
great Ship in-
to Billingsgate
Dock.

And it was excepted, on Motion for Quashing of this Indictment, that it was inconsistent to say that a Place is a common Dock, and that it would be a Nuisance for a great Ship to come there; for a common Dock in its Nature is free for all Ships.

See 1 Hawk.
chap. 75. per
tot. and 2
Hawk. chap.
10. sec. 59.
and chap. 25.
sec. 35, 61.
Caf. temp.
W. 3. 342.

But per Cur': Why may there not be a common Dock only for small Ships, as well as a common Pack and Horse Way: And if a Man with a Cart uses such a Way, so as to plow it, and render it less convenient for Riders, will not that be a Nuisance indictable? Besides, we never quash Indictments for Nuisances. But if a Nuisance be removed, and Party confesses it, it will be a great Mitigation of the Fine, that is, the Removal will, and it may in that Case be proper to offer Affidavits to lessen the Offence to the Court, but not otherwise. And they put the Defendant to demur, which he did; quod Nota.

510, 519.
626, 635,
639, 640.

Defendant
put to demur,
and remove
the Nuisance.

Williams *versus* Jackson.

What Notice
ought to be
given of Tri-
als, and exe-
cuting Writs
of Inquiry.

UPON a Point, what Notice there should be to Defen-
dants, of Trials, and Executing of Writs of Inquiry,
these Points were agreed by the Court:

Caf. temp. W. 3. 435, 525. Ld. Raym. 1382. Caf. temp. An. 237. 1 Mod. Caf. in L. & Eq. 366. Comyns 53. 1 Barnes 84, 205, 209, 223, 225, 289, 291, 298, 302, 304. 2 Barnes 237, 238, 239, 240, 241, 242, 244, 245, 246, 247, 203, 111. Stra. 248, 1119, 1142, 1216, 1237, 211, 531, 1164, 849, 1073, 1100.

1 Keb. 112.

1 Sid. 34,

231.

2 Lilly 151,

356.

2 Salk. 465,

647, 650.

Inst. Leg. 64,

143, 4, 293.

&c.

1. That convenient Notice was as much necessary, and fit to be given, of the Executing of a Writ of Inquiry, as of a Trial.

2. That by a late Rule of Court, if a Writ of Inquiry or Issue be to be tried in London or Middlesex, and the Defendant live not above 40 Miles off, eight Days Notice will suffice; but if it be above 40 Miles off, there ought to be 14 Days Notice in either Case.

3. That the Reason is the same in all other Cases, where the Parties are above 40 Miles distant from the Place where the Trial is to be, though they be Country Causes: Yet because it is an ancient Rule, that eight Days Notice should be sufficient in all Country Causes, and that had been done in the Case now in question, it being a Country Cause, the Execution of the Writ of Inquiry stood; and the Court said, They would consider of altering the Rule.

Why fifteen

Days between

Teste and Re-

turn of Pro-

cess.

2 Salk. 599,

602.

Caf. temp. W. 3. 524.

Caf. temp. An. 255, 260.

Caf. temp. Mac. 82.

1 Mod. Caf. in L. & Eq. 31, 305,

&c. 1 Barnes 73.

Stra. 765, 917.

And per Cur', The Reason why by Common Law there are fifteen Days between Teste and Return to Process, is, because that was thought a sufficient Time to come from any Part of the Kingdom to another, for at twenty Miles a Day a Man in fifteen Days will go all over the Land.

Plea to the

Jurisdiction

of an inferi-

our Court,

tendered after

the Court

was up.

1 Vent. 88,

181, 333.

Raym. 189.

1 Mod. 63.

1 Sid. 464.

2 Mod. 197.

2 Inst. 230.

The Oath

ought to be

upon Tender

of the Plea.

1 Vent. 181.

1 Vern. 301.

DEBE was brought in London: A Prohibition was moved for, and ruled Nisi, upon Suggestion that the Defendant had tendered for Plea below, that the Cause did arise out of their Jurisdiction, and offered to make Oath of the Truth of his Plea.

Now it was shewed, that he tendered the Plea after the Court was up, whereas it should be in propria Persona, and in Court; and tho' an Affidavit was offered here of the Truth of the Plea, and one Turner's Case, 4 Jac. 2. was quoted out of Lutwyche, where a Prohibition had been granted upon such an Affidavit here above without Oath of it below: Yet per Powel, Powys & Gould, absente Holt, Ch. Just. the Rule was discharged; for in all Pleas that oust a Court of Jurisdiction, whether inferiour or superiour, there must be Oath in that very Court of the Truth of the Plea. Quare, if they refuse the Oaths.

*Cragg versus Bowman :*At *Nisi prius*, coram Trevor, Chief Justice *de Banco*.

A Feme Covert had parted from her Husband by Consent, who allowed her separate Maintenance, and came from Beverly in Yorkshire, where the Husband lived, to London: Where living in Adultery, some four Years after she became big with Child; and in that Condition comes to lodge with the Plaintiff, who did not fully appear to have known any Thing of the Matter, and lodged and boarded with him for nigh a Twelve-month; he was likewise at the Charge of her Lying in. Now the Action was brought against the Husband for this Debt; and all this Matter appearing on Evidence, the Chief Justice ordered the Plaintiff to be called: For he said, That though the Husband be bound to pay the Wife's Debts for her reasonable Provision, yet if she parts from him, especially by reason of her Misbehaviour, as here it must be presumed she did, she living in Adultery after the Separation, and he allows her a Maintenance, he shall never after be charged with her Debts, till a new Cohabitation.

Vide 1 Salk. 113, 116, 119.
1 Keb. 69, 337, 482.
1 Mod. 124.
2 Sid. 109.
1 Lev. 4.
Feme Covert after parting by Consent, and separate Maintenance allowed commits Adultery and runs her Husband into Debt.
Q. If the Husband shall be charged.
Ante 105.
Post 162, &c.
Vide 1 Salk. 116, 119.
1 Keb. 96, 337.
1 Sid. 127, 425, acc.
Caf. temp.

Note; Here the Woman lived very decently and modestly all the while she was in the Plaintiff's House; and also it was proved, that her Maintenance was duly paid to her.

Post 171. Ld. Raym. 444, 1006. 2 Vern. 386, 493, 671, 752. Prec. Chan. 502, 239, 496. W. 3. 244, 245, 276, 372. Caf. temp. An. 241. Stra. 127, 647, 706, 875, 1122, 1214.

Popley versus Ashly.

THE Defendant being a Captain of a Ship, took several Goods for the Use of the Ship from the Plaintiff, who sent his Servant with a Bill to him for his Money. The Defendant orders the Servant to write him a Receipt for the Money, which he did, and thereupon he gives him a Note upon a third Person, payable in two Months. The Master sent several Times to the third Person to present him the Note, but could not get Sight of him within the Time at which the Money was payable: The Party breaks, and now this Action was brought for the Money against the Captain. All this appearing on Evidence, and that the Captain went to Sea next Day after he gave the Note, the said Chief Justice directed for the Plaintiff.

Captain of a Ship takes a Receipt, and gives a Note upon a third Person, who failed before the Note was due, and the Captain was gone to Sea.

And per ipsum, If a Man give a Note upon a third Person in Payment, and the other takes it absolutely as Payment; yet if the Drawer knew the third Person breaking, or to be in a failing Condition, and the Receiver of the Note uses all reasonable Diligence to get Payment, but cannot, this is a Fraud, and therefore no Payment, and here was no Laches in the Plaintiff; for the Party failed before the Money was payable, and the Captain was gone to Sea, so he could not bring him back to him to give him Notice: But if a Man

The Receiver uses Diligence to get such Note paid, but cannot, &c. 'tis a Fraud in the Captain, &c.
Post 301.
Ld. Raym. 930.
Caf. temp.

W. 3. 241, 244, 408, 517, 521. Caf. temp. Mac. 109, 110. Gilb. Eq. Rep. 155. Stra. 415, 416, 508, 550, 707, 910, 1175, 1248, 1195.

takes a Note, and after it is payable makes no Demand, and that he might be paid if he had been diligent enough, there if the Party, on whom the Note is, fails, it is at his Peril that took the Note.

2 Salk. 696.
S. C.

Graves *versus* Blanchett.

Words spoken
at several
Times in De-
famation of a
young Wo-
man: Ver-
dict, and in-
tire Damages,
the first Words
not being ac-
tionable, &c.
Ld. Raym.
710, 1004,
1007. Caf. temp. W. 3. 597, 633. Caf. temp. Mac. 385. Stra. 666, 936, 946, 471, 545, 555.

IN Case for Words, the Plaintiff declared for Words spoke at several Times: The first were, She is a Whore, and has had a Bastard by her Father's Prentice; alledging a Colloquium: The other, Thou art a Whore, and hadst a Bastard by your Father's Prentice; quorum quidem aliorum verborum propalatione, &c. such a one who courted her for a Wife, and was ready to marry her, fell off: Verdict, and intire Damages, and moved in Arrest of Judgment, that the first Words were not actionable, the special Damages being tied up to the latter Words by the Word aliorum.

Carth. 498.

And per Cur', If it were res nova, it were reasonable to make the first Words actionable, for no greater Misfortune can befall a young Woman, whose Well-doing depends upon her having a good Husband, than to be reputed a Whore: But the Authorities are too many and great to run counter to them; and the Reason of them is, that Fornication is a Spiritual Offence, not punishable at Common Law; and an Action shall not lie for charging one with an Offence of which the Law takes no Notice, without special Damages; and if Anne Davis's Case had been pursued, as it has been contradicted, it would do: And there was a Time when Hereticks were put to Death, yet it never was actionable to call a Man a Heretick: And Judgment arrested, viz. Quod Quer' nihil cap', &c.

Vid. antea.
Vide 1 Vent.
4.
1 Sid. 396.
Hob. 296.

1 Cro. 436.

Harvey *versus* Broad.

2 Salk. 626.
S. C.
S. C. cited
Ld. Raym.
1066.
Vide post
159, 196,
250, &c.
Writ of In-
quiry return-
able Tres
Trin', which
being a Sun-
day, and the
right Effoin-
day.
Vid. antea
41, 81.
Ld. Raym.
4. 1557.
Caf. temp.
An. 120.
Stra. 811.
Note; Tres
Trin' is always on a Sunday. Vide post 159, 196, 252.

Judgment was by Default in the Common Pleas, and Writ of Error of it there; and upon the general Error assigned, it was shewed, that the Writ of Inquiry was returnable Tres Trin', which in Fact happen'd to be Sunday the 14th of June: The Writ was return'd executed the 14th of June ult' præterit', which must be a Year before.

Per Cur', A Writ of Inquiry may be executed on the Day on which it is returnable, and the ult' præterit' is but a Mistake, the Return being made after the 14th Day; and the ult' præterit' was intended to go to the Day, and not to the Year, and therefore you may amend it in Common Pleas: But what is fatal, is, that Tres Trin. is the Sunday, and right Effoin-day of the Term; and though the Effoins be kept on Monday, yet a Writ returnable Tres Trin', when that falls on a Sunday, though the Return be kept on the next Day, cannot be executed on the next Day, and therefore Judgment was reversed nisi. Vid. postea.

Cole

Cole *versus* Turner :Coram Holt, *Ch. Just.* at Nisi prius.**U**PON Evidence in Trespas for Assault and Battery :Holt, *Ch. Just.* declared, 1. That the least touching of another in Anger is a Battery.

2. If two or more meet in a narrow Passage, and without any Violence or Design of Harm, the one touches the other gently, it will be no Battery.

3. If any of them use Violence against the other, to force his Way in a rude inordinate Manner, it will be a Battery; or any Struggle about the Passage, to that Degree as may do Hurt, will be a Battery. Vid. Bro. Tresp. 236, 336. 7 E. 4. 26. 22 Ass. 60. 3 H. 4. 9.

What Assault, &c. makes a Battery.

Vide post

172.

Carth. 480,

491.

2 Roll. Rep.

545.

1 Mod. 3.

2 Keb. 545.

Ld. Raym.

62, 231.

Note; It was in Action of Battery by Husband and Wife, for a Battery upon the Husband and Wife, ad dampnum ipsorum; and though the Plaintiff had Verdict, yet the Chief Justice said, he should never have Judgment: And Judgment was after arrested above upon that Exception.

Vide antea

127.

Turner *versus* Nurse.

Note. **A**N Order of the Court of Chancery is not to be given in Evidence, without producing a Copy of the Bill on which it was made; yet a Commission out of Chancery to abut and bound certain Land, return'd and acquiesced under, and an Enjoyment accordingly, is good Evidence of the Land so bounded being rightly bounded; but a bare Commission return'd without more, is no Evidence at all. Vide 1 Salk. 278, 281, 283, 286, &c. 555, 566, 690. 2 Salk. 555. Faresl. 129, 141.

Where an

Order, or

bare Com-

mission of

Chancery is

no Evidence.

Vide post.

225.

Ld. Raym.

220, 311,

504, 730,

734, 735, 893, 936, 1166, 1292. 1 Vern. 413, 331. Caf. temp. W. 3. 136, 231. Caf. temp. An. 210, &c. Caf. temp. Mac. 108, 109, 126. 1 Mod. Caf. in L. & Eq. 75, 181, 322. 2 Mod. Caf. in L. & Eq. 66. Gilb. Eq. Rep. 16, 18. Fitz G. 197. Stra. 920, 481, 162, 545. Ld. Raym. 388, 473, 501, 1093.

Per Cur', If a Man either by Grant or Prescription has Right to Wreck thrown upon another's Land, of necessary consequence he has a Right to a Way over the same Land to take it; and the very Possession of the Wreck is in him that has such Right before any Seizure: Originally all Wrecks were in the Crown, and the King has a Right to Way over any Man's Ground for his Wreck; and the same Privilege goes to Grantee thereof.

Privilege of

the Grantee

of a Wreck

for a Way to

it.

Vide ante 3.

Post 163.

1 Roll. Abr.

60.

Noy 9.

Hale *versus* Claro.

1 Salk. 266.

S. C.

Vide Faresl.

103.

IT was a Writ of Error of a Judgment in the Palace-Court, and a Variance between the Plaintiff and Declaration, viz. That the Plaintiff was enter'd at the Suit of C. F. generally, and the Declaration was C. F. Executor, &c. So that the Plaintiff was in his own Right, and the Declaration as Executor: This was assigned for Error. Post 181.

Judgment

reversed up-

on Error in

the Palace-

Court for

Variance be-

tween the

Plaint and

Declaration.

Alit', If after
a Verdict.

Vide 1 Vent.
6.
2 Cro. 108,
109. contra.
1 Jo. 304.
1 Cro. 282.
Vide Hob.
130, 135,
264, 282.

Per Cur', If this Variance had been in a Record certified from the C. B. between the Original and Declaration, where the Original is only by way of Recital, the Party might alledge Diminution, and have the right Original if any certified: But the Difference is between inferiour and superiour Courts, for no Diminution can be alledged of a Record removed out of an inferiour Court; but the Court must take it as they find it at first, and this Variance is fatal; and Want of a Plaintiff in an inferiour Court, is like the Want of an Original in a superiour Court, and therefore curable by Verdict: So, if there had been a Verdict in this Case, the Question would be, Whether we would not look upon a Plaintiff in another Action to amount to the Want of a Plaintiff, and so aid it by the Verdict? But it being not after Verdict, that Matter falls not under Consideration. Et per totam Cur' Jud' revers'.

2 Salk. 629.
S. C.

Covenant for
quiet Enjoy-
ing; Defen-
dant pleads
he entered to
distrain, and
traverses the
Ouster. Plain-
tiff demurs,
Judgment for
Defendant.
Carth. 205,
177, 183,
290, 519.
Vide Vaugh.
175, 176.
2 Co. 1.
8 Co. 91.
3 Cro. 914.
2 Saund. 177.
Yelv. 30.
1 Vent. 272.
Latch 105.
1 Lut. 317,
323. 1 Inst. 282. Hob. 53. 1 Mod. Cas. in L. & Eq. 318, 319. Comyns 230.

White *versus* Bodinam.

Lessee for Years brings Covenant against the Lessor, declaring upon a Demise and Covenant for quiet Enjoyment, and assigns for Breach, that the Lessor did enter upon him, and oust him of the Premises: The Defendant pleads, That he enter'd to distrain for Rent arrear, absque hoc that he did oust him de Premissis. To which the Plaintiff demurs, thinking the Traverse ill; because if he had ousted him of any Parcel of the Premises, he had a good Cause of Action; therefore he should have traversed, absque hoc that he ousted him of the Premises, or any Part thereof.

But per Cur', The Plea is well enough in this Case; for if the Plaintiff will join Issue upon the Matter of the Traverse, and prove Ouster of any Part, the Issue will be for him. And the Court took a Diversity between pleading of the General Issue, (as in Debt you must plead, Non debet nec aliquam inde Parcellam) and a Special Issue as this is. 3 Cro. 83, 84. Robert *versus* Andrews, Dyer 115. And Jud' pro Defend'.

1 Salk. 358.
S. C.
Farell. 91.

Domina Regina versus The Dutchess of Bucklew, Sir John Bucknall, my Lady Anne Franklin & al', Tenants of Lands, now or heretofore Part of the Manor of Delemore in Hertfordshire.

Vide post
191, 255,
307.
Information
upon suffering

At a Trial at Bar upon an Information, for suffering a common Bridge to be ruinous, and out of Repair, these Points were resolved by the whole Court:

a Bridge to be out of Repair. Ld. Raym. 792, 804, 856, 1175, 1249. Cas. temp. W. 3. 13, 198, 409.
1 Mod. Cas. in L. & Eq. 119. Stra. 180, 900.

1. If a Manor be holden by the Service or Tenure of Repairing a Bridge, Highway, &c. and Part of it be after severed from the Manor, yet the Charge or Service shall run with it; and every one of

of the Alienees, of ever so small a Matter or Parcel of the Demesns ^{Bridges, &c.} or Services, is answerable to the Publick for the Whole, and are ^{See Salk. 356, &c. to 359.} contributory among themselves.

2. If a Manor be holden of the King by Knights Service, and the Lord since or before the Statute of Quia Emptor. terr', aliens Part of the Demesns, Alienee shall hold by Knights Service.

3. If the Lord of a Manor grants a Rent-Charge thereout, and ^{Rent-charge.} alien Part of the Demesns, the Alienee shall hold it charged with the Rent.

4. Upon Alienations, or Severance of Parcel of the Manor, the Lord may agree to discharge the Land of the Repairs; but that only binds himself, and such as claim under him, and not the Publick.

5. A Manor is an intire Thing, and not severable.

6. Lands once severed from a Manor, can never after become ^{1 Salk. 186, 187.} Parcel of it in Reality, but it may in Reputation; as if Lands, Part of a manor, be alien'd away absolutely, and repurchased, and an Unity of Possession for a considerable Time after.

7. Were a Park was Parcel of a Manor, which none can have but by Grant or Prescription.

Note; This whole Manor was several Times in the Crown as Part of the Duchy of Lancaster.

Clerk *versus* Dealy:

At Nisi prius, Coram Holt, Ch. Just.

PLaintiff as Executor brought Indebitat' for Money of the Te- ^{Indebitat. aff.} stator received after his Death to the Plaintiff's Use, and ^{by an Execu-} produced the Testator's Debtor, who paid it, as a Witness; but ^{tor, for Mo-} he was rejected. ^{ney of Testa-}

Per Holt, Ch. Just. For the Plaintiff by bringing this Action ^{Vide 1 Salk. 27, 28.} determines the Election he had of suing the original Debtor, or ^{Ld. Raym. 437, 1413.} the Receiver, and allows of the Payment; but if he be nonsuited, ^{Evidence.} the Matter is at large again, and he may sue the Debtor, and ^{Vide 1 Salk. 283, 285, 286, 287.} therefore the Debtor swears to discharge himself, and by conse- quence is no Witness.

It appeared also, that another Sum of Money mentioned in the Declaration, was found by the Defendant in the Testator's Room after his Death, which he took.

And per Holt, Ch. Just. As to that, the Plaintiff mistook his ^{Trover,} Action; for he should have brought Trover, and not an Indebit. ^{Plaintiff non-} for ^{sued.} Money received to his Use: And the Plaintiff was nonsuited.

Domina

Domina Regina *versus* Chapman late Mayor of Bath.

Information
for false Re-
turn of a
Mandamus by
a late Mayor.
Vide 2 Salk.

428, 429,
430, 431.
1 Salk. 77,
78.
Post 309.
See Carth.
170, 171,
173, 293.
Skinner 293,
310, 368.
q. 2 Hawk.
ch. 10. sec.
47, &c.

Ld. Raym. 564, 126, 840, 849, 885. Caf. temp. W. 3. 126, 308, 322, 332, 408, 410.

AN Information was against him, for making a false Return to a Mandamus, commanding him to proceed to the Election of a Town-Clerk for the Corporation, in the Room of one Bushell. To which he return'd, That before the Arrival of the Writ, J. S. had been duly chose, and sworn into the said Office: And it appear'd on Evidence, That the Right of Election was in Thirty Common-Council Men; that the Mayor at such a Time before the Arrival of the Writ, had summoned them to meet in order to the Election; that Twenty-eight met, that three Candidates were set up, that Two of the Twenty-eight voted for one, that thirteen voted for another, and the Mayor and Twelve more voted for the Third; that the Mayor pretending to have a casting Voice, declared his Man duly elected, and at another Court swore him in.

And the following Points were in this Case ruled by Holt, Ch. Just. at Nisi prius.

Evidence of
this False
Return.

Vide Salk.
431, 701.

1. That there needs no more Evidence to prove this Return to be the Mayor's, but the Copy of the Writ and Return thereof in the Crown-Office.

2. That tho' upon the Consultation the Majority be against him, and make a Return in his Name, yet it shall be taken to be his if he does not come and disavow it.

3. That it is not necessary to prove a Delivery of the Writ to the Mayor, no more than to a Sheriff in a false Return against him.

4. That notwithstanding, the Writ is to be delivered to the Mayor as the most visible Part of the Corporation.

5. That this Action for a false Return may be brought against the whole Corporation, or against any particular Member of it.

6. That the Mayor or other Head Officer, of Common Right, has not a Casting Voice; but such a Thing may be by particular Constitution, as by Prescription or Charter.

5 Mod. 404.

7. If there be an Equality of Votes, and therefore they cannot choose, upon Mandamus they must agree, or else they shall be all brought up as in Contempt, and laid by the heels till they do agree; for after a Jury is sworn, they shall be impounded till they all agree; but here it suffices that a Majority do agree.

And the Mayor was found guilty.

Dove *versus* Smith.

IN Trespass for breaking the Plaintiff's Close, and treading his Grass, it appeared on Evidence, That the Plaintiff had a Close adjoining to the back Part of the Defendant's House, which was a Publick House: The Defendant sometimes used to set a Table for his Guests in the said Close, and serve them there: That he often used to walk there for his Pleasure, and with others, who shot with Bows and Arrows there.

In Trespass for breaking his Close, and treading down his Grass. Vid. ante 38, 105. 2 Mod. 253. 5 Mod. 178.

Per Holt, Ch. J. You must give Evidence of the Value of the Damages done, or you cannot recover, for the Law goes by Evidence. And if in this Case the Jury give under 40 s. Damages, tho' the Title of the Land doth not come in Question, yet will I certify for Costs, for this is a voluntary malicious Trespass, and the Statute is only to be understood of small accidental Trespasses. And here it being upon a Not guilty, they could not give any Matter of Right in Evidence, not even in Mitigation of Damages.

Lutw. 1301, 1304, &c.

22, & 23 Car. 2. c. 9. last sect.

Per Cur'. If an Attorney be well known, and may be found, it is not sufficient to leave a Declaration for him in the Office, but it ought to be delivered to him, otherwise it suffices to leave it in the Office.

Leaving Narr's in the Office. Ld. Raym. 1407. Caf. temp.

W. 3. 217, 231. 1 Mod. Caf. in L. & Eq. 227, 379.

Anonymus.

AN Action in this Court upon a Judgment for Damages in the Common Pleas.

Motion before Plea to bring Money into Court, and denied.

And Salkeld, now before Plea, moved to bring so much into Court, and to have it struck out of the Declaration.

Vide Farell.

Holt, Ch. J. No: You may plead Tender, and Uncore Prist.

14, 140. 2 Salk. 583, 596, 597. Antea 11, 25. 60, 101.

But then the Counsel discovered that the Plaintiff below was now become a Bankrupt, and no Commission being out, they durst not tender him the Money, but would bring it into Court, to remain in Trust for him that should have Right.

Caf. temp. W. 3. 90, 95, 187, 153, 241, 598, 614, 633.

Holt, Ch. J. You are in the right to take Care how you pay it voluntarily, but we cannot be Trustees for you.

Caf. temp. Mac. 26. 1 Mod. Caf. in L. & Eq. 236, 242, 395, 379.

And they would make no Rule.

1 Barnes 197, 198, 199, 200, 201, 202, 181. 2 Barnes 229, 230, 231, 232, 233, 275, 276, 297. Str. 638, 1027, 787, 890, 1191, 142, 787, 796, 906, 1217, 1220, 515, 814, 957, 413, 900, 1107.

Rich *versus* Doughty.

Sheriff returns
a Warrant,
that one who
had escaped
out of K. B.
was taken
upon an Es-
cape War-
rant, &c.

Vide ante 22,
63, 95, 125.
Post 183,
253.
5 Mod. 8.
Caf. temp.
W. 3. 31,
227, 230.
Comyns 554.
Ld. Raym.
309, 310,
353.

HE was a Prisoner in the King's Bench, and having escaped, was taken up on a Judge's Warrant, pursuant to the late Act, by a Parcel of People, whereof none was an Officer as the Act directs.

And Mountague having disclosed the Matter by Motion, the Sheriff was ordered to return the Warrant, which he did thus: That he was brought to him in Custody of one R. and others to him unknown, by Vertue of the Warrant; and that he detained him in Custody juxta Exigentiam Warranti præd'.

And tho' Brotherick urged, that this Act, being in Aid of Execution of Justice, ought to be favourably extended; and therefore the Prisoner being brought to the Sheriff, and delivered to him together with the Warrant, tho' the original Taking were illegal, yet the Warrant being directed to all Sheriffs, Mayors, &c. the Sheriff at his Peril must now detain him.

Sheriff ought
not to receive
him from any
but a Consta-
ble.

Vide Hob.
63. si'le.

Pet, per Holt, Ch. J. He is brought to the Sheriff by a Warrant illegally executed, and therefore it is the same Thing as if there had been no Warrant at all. And suppose the Sheriff had a Warrant for him, and he is forcibly brought before him by a Person that has no Authority, the Sheriff cannot detain him by the Warrant, by grafting a legal Imprisonment upon an illegal one: And if he does, False Imprisonment will lie against him; and he cannot justify receiving any that is brought to him in illegal Custody, and he is not bound to receive him from any Body but from a Constable, or other Peace Officer. Indeed, if he asks him that brings the Prisoner what he is, and he affirms himself to be a Constable, &c. he must believe him, and make a Return accordingly; and here the Return not being filed, they gave him Time to amend, which he would not do.

Vide antea.

And at another Day, the Return being filed, the Court adjudged it insufficient, and granted an Habeas Corpus to bring the Prisoner back to the King's Bench Prison.

Foxton *versus* Mosely.

Covenant
brought by
an Appren-
tice.

Covenant by an Apprentice for not teaching him four several Trades in an Indenture of Apprenticeship mentioned. The Defendant instead of craving Oyer of the Plaintiff's Indenture, sets forth an Indenture of his own, and pleads a Performance of the Covenants therein contained.

And upon Demurrer, adjudged pro Quer. For the Defendant cannot shew any other Indenture, but crave Oyer of the Indenture declared on.

Collins *versus* Jessot.

2 Salk. 437.
438, 553.
S. C.

King moved for a Prohibition to the Spiritual Court for libelling there to dissolve a Marriage because of a Precontract, but the Libel did not set forth that it was in order to a Dissolution, and therefore the Suggestion was, That the Libel did not in Certainty shew the End of the Prosecution, as it was said they ought to do, that the Court here might see whether it was an End proper for them to prosecute for. F. N. B. 41. a.

Motion for a Prohibition for libelling in Spiritual Court, to dissolve a Marriage because of a Precontract.

Holt, Ch. J. If Contract be per Verba de præsenti, it amounts to an actual Marriage, which the very Parties themselves cannot dissolve by Release or other mutual Agreement; for it is as much a Marriage in the Sight of God, as if it had been in Facie Ecclesiæ; with this Difference, That if they cohabit before Marriage in Facie Ecclesiæ, they are for that punishable by Ecclesiastical Censures; and if after such Contract either of them lies with another, they will punish such Offender as an Adulterer.

How if a Contract be per Verba de præsenti. Swinb. de Sponsalib.

And if the Contract be per Verba de futuro, and after either of the Parties so contracting, without a previous Release or Discharge of the Contract, marry another, it will be a good Cause with them of a Dissolution of a second Marriage, and of Decreeing the first Contract's being perfected into a Marriage. Quæ omnia tota Cur. concess. except the last Point, whereof Powell doubted.

Or if per Verba de futuro.

Upon which Holt, Ch. J. added, That it was first resolved in my Lord Vaughan's Time, that an Action would well lie at Common Law for Breach of such an executory Contract per Verba de futuro, which Resolution Vaughan totis Viribus opposed, because the Party had this Remedy in the Spiritual Court, which was agreed by all.

Vide Cro. El. 79. Stra. 34. Election of Remedy by the Party.

But notwithstanding, it was resolved the Party had his Election of either Remedy, and that by bringing Action at Common Law, and that appearing on Record, the Remedy in the Spiritual Court was actually released; for now, in Lieu of a Performance of the Contract, he shall recover Damages.

Damages may be recovered.

And he quoted a Case which he remembered had been tried at Guild-hall, which was an Action for Breach of such a Promise, and upon Issue of Non assumpsit, Proof was made of the Promise. But the Defendant shewing that he had been sued for the same Matter in the Spiritual Court, and producing a Sentence against the Plaintiff, the Plaintiff notwithstanding this Proof was nonsuited, because that they were the proper Judges in the Spiritual Court whether it were a Precontract or not.

5 Co. 31. a.

Vide 2 Lev. 15, 16. acc. Stra. 960, 961.

And

Post 172.
3 Lev. 65.
5 Mod. 411.

And if a Man and Woman make mutual Promises of Inter-marriage in futuro, and the Man gives the Woman 100 l. in Satisfaction of the Promise, and she accepts it so, it is a good Discharge of the Contract.

And being stirred again at another Day:

Jurisdiction
of Spiritual
Court al-
lowed.

Per Cur'. The Spiritual Court have Jurisdiction of all Matrimonial Causes whatsoever, and where it appears to us that the Cause is spiritual, of which in Consequence they have Cognizance, unless it be by reason of some collateral temporal Matter in it, we ought not to prohibit them. And it is no Reason here to prohibit them, because this may be a future Contract, for Breach of which an Action at Law will lie no more than when they libel for laying violent hands upon a spiritual Man, for which an Action at Law lies for him for the Battery, and a Suit in the Spiritual Court for the Irreverence to his Character.

Vid. Hob.
79, 213.
2 Salk. 553.

And per Holt, Ch. J. There is a great Diversity between the Spiritual Court and Court of Admiralty in Reference to Suggestions for Prohibitions, for the Admiralty has Jurisdiction in respect of Locality of Cause of Action, let the Nature of the Action be what it will; and therefore for a Prohibition, tho' they lay the Cause to arise super altum Mare, yet the Party may suggest the contrary to oust them of Jurisdiction; but the Jurisdiction of Spiritual Court is in respect of the Nature of the Thing, viz. if it be Matrimonial or Testamentary, and therefore, if it appear by the Libel to be of that Nature, we will not prohibit them.

Post 172.

And Powel condemning the Diversity in F. N. B. 107. a. between Promise to give 10 l. with his Daughter in Marriage, and to pay him 10 l. if he married his Daughter: Holt, Ch. J. said, That by the first was understood 10 l. to be laid down upon the Book at the Time of Marriage, and therefore it was matrimonial.

And Prohibition denied per tot. Cur'.

Smith *versus* Bartlett.

How the Act
of Composition
ought to
be pleaded.
Vide ante 58.

DEBE upon a Bond, and the late Act of Composition of two Thirds in Number and Value of the Creditors pleaded in Bar, averring, that he was indebted to the Plaintiff in 49 l. the 17th of November 1697. and did then abscond, a Replication and Rejoinder.

And Acherly excepted to the Declaration, that the Absconding ought to be averred on the 1st of October, being the Time on which the Session begun, and to which the Act as to this Part relates: And this appears plainly by the Word have in the Clause of Absconding in the Statute.

Et Jud. pro Quer'.

Famshaw *versus* Morrison.

Hill. 3 Annæ, in B. R.

Judgment was in C. B. upon Sci. fa. on a Recognizance by Bail, upon a Writ of Error, *Quod* the original Plaintiff should have Execution upon the Recognizance, *Et quod recuperet damna sua*, which he had sustain'd *Occasione Dilationis Executionis*. And the Exception taken was, that the Court had no Power to award Damages for Delay of Execution, but they should give him them for Costs of Suit.

1 Salk. 208.
S. C.
S. C. Ld.
Raym. 1138.
2 Salk. 520.
Post 197.
Judgment upon a Recognizance by Bail, &c.
Post 159.
See Carthew 415. & Skinner 100, 120.

Per Cur. Damages generally include Costs, which Word [Costs] properly signifies Costs of Suit, and Delay of Execution is properly Damage, viz. the being so long out of his Money, which the Court used formerly to assess, by allowing the Party the lawful Interest: So Damages of Delay of Execution, and Costs of Suit upon the Statute, are very different, and to be assess'd by different Measures, and the Statute gives only Costs of Suit against the Bail, &c.

Costs and Damages.
V. Gilb. Eq. Rep. 195, &c. 199.
1 Barnes 306.
3 Jac. 1. c. 1. or c. 8.

Ideo per Omnes, This is Error. Vide tamen 2 Cro. 420.

Rowston *versus* Combat.

Indebit. assumpsit for Goods sold and delivered: Defendant pleads *Quod ipse ad Nar' præd' respondere non debet, quia there is another Action pending ex eadem Causa in C. B.*

Auter Action pending, ill pleaded.
Fitz-G. 313, 314.

Ld. Raym. 1014. Cal. temp. W. 3. 48, 91, 204, 307.

Per Cur. This is not a Demurrer to your Declaration, or a Plea in Bar, but in Abatement of the Declaration; and respondeat ulterius was awarded.

For Pleas of other Action pending in Bar or Abatement, vide 6 Co. 7, 8, &c. Ferrar's Case. 5 Co. 7. b. 32. b. 4 Co. 39, 40. Cro. El. 668. Lat. 193. Mo. 458. 2 Vent. 168. 2 Mod. 2. 1 Lut. 41, 42, &c. Hob. 138, 139. See also Carthew 455, 456, & post 217, 218.

Gilbert *versus* Parker & al'.Salk. 629,
630. S. C.Replevin for
Cattle.
Justification
Damage-fe-
sant.Vide 9 Co.
66, 112.
8 Co. 89.
3 Lev. 104.
Lutw. 1177,
& 1316.
2 Salk. 580,
583.Cas. temp.
W. 3. 188,
190, 191.
Cas. temp.
Mac. 37.
Ld. Raym.
42, 104,
310, 405.Carth. 179.
5 Mod. 150.
Vide post
223.Vid. 1 Ed. 4.
9.
Dyer 280.
2 Vent. 228.
Hutt. 120.How the
Plaintiff
might have
derived his
Title, and
traversed.
Vide Hob.
119, acc.

REplevin for taking the Plaintiff's Cattle in such a Place. De-
fendant makes Conuzance as Servant to G. P. who was seised
of the Place where in Fee, and justifies the Taking Damage-fesant.

The Plaintiff in Bar of the Conuzance alledges, that he himself
was seised in Fee of a third Part of a Moiety of a Fifth Part of
the Place where, and justifies putting in his Cattle, absque hoc
that the Defendant's Master was sole seised thereof. To which
there is a Demurrer, of which Brotherick assigned for Reason:

1. That the sole Seisin here is not alledg'd, and therefore not
traversable.

2. This Plea confesses and avoids our Title, and for that too
it is not traversable.

He agreed, That whatever is necessarily implied in the making a
Title, may be traversed; for if it be necessary, the Plea will be bad
without it be intended; and if it be necessary, and for that intended, it
may be traversed as a necessary Part of the Title: And a Conuzance
is in Nature of a Declaration, whereby one makes himself a Title
to distrain. And here the Plaintiff ought to say that we have no Sei-
sin at all, or to shew that he has Right to put his Cattle there by some
Title consisting with ours; but now he brings in his own Title by
way of Inducement, so that we cannot traverse. And he offered to
shew a Diversity between an Abowry upon a Title, and Conuzance
or Abowry for Damage-fesant; for if one abow for Rent, he must
shew his Title and Tenure in particular, and there the Defendant
may traverse any Part of what he had set out; but to abow for Da-
mage-fesant, it suffices upon the whole Matter that a Title appear
for him to distrain, tho' not exactly agreeing with what he set out; for
there the Plaintiff must shew the Taking unjust, by making himself
Title, or by utterly destroying the others. Vide Hob. 72. Mo. 863.

Holt, Ch. J. You set out a Seisin in Fee, and nothing more need
be traversed. And here he might have said that J. S. was seised, and
derive Title under him, absque hoc that you were seised; or that he
was Tenant in Common with you, absque hoc that you were seised
Modo & Forma, and it had been well. Vide 3 Cro. 795. Defendant
justified Distress, for that A. being seised of the Place where, surren-
der'd it to him and two more, who died, and conveys to him as Sur-
vivor, whereby he became sole seised. Plaintiff replies, confessing
the Surrender to three, the Death of two, but that one of them
before his Death surrender'd his Share to him, absque hoc that the
Defendant was sole seised, and adjudged good on Demurrer. Winch 7.
2 Mod. 6. In Trespass the sole Seisin is traversed, tho' but a Sei-
sin in Fee generally be alledged: And where one alledges Seisin in
himself generally, it will not be enough for another to alledge him-
self

self to be a Tenant in common with him, without traversing the sole Seisin, for it is not a Confession and an Avoidance. And if here he had replied, that J. S. was seised in Fee, and make Title under him, absque hoc that the Defendant was seised Modo & Forma, and upon Issue the Defendant were found seised of a Hoisety only, it would be against him; for he avowed as one sole seised, when it should be as Tenant in Common. And where Dyer 280. is objected, 1. The Court were divided upon it. 2. There may be a Difference between Coparceners and Jointenants, and Tenants in Common; for the two first are seised per my & per tout, but the last have several Seisins, and here to introduce his Traverse, he must make himself some Title, to enable him to controvert with the Defendant. And there is no Difference between Avowry and Justification, as was urged; for in both, if the Party set forth a Falstiy, he is bound to maintain it.

Difference between Coparceners and Jointenants, and Tenants in Common. Carth. 16, 96, 289, 364, 329, 505.

Et sic per totam Cur' Judic' pro Quer' nisi.

Judic' pro Quer' nisi.

Note; As Authorities were quoted at the Bar, 1 Ed. 4. 9. 37 H. 6. 31. Br. Traverse 142. 21 Ed. 4. 65. b. 32 H. 6. 2. b. Keilw. 27. 1 Lev. 78.

And though it was said by Brotherick, that by 1 Ed. 4. 9. it was agreed, that laying a Seisin generally in a Declaration did not import a sole Seisin, as it would in a Bar, Repl', &c. and that an Avowry was no more than a Declaration.

Ideo Holt, Ch. J. said, An Avowry was a Declaration, and more.

Parkins *versus* Chatherton.

DEBT upon a Recognizance by Bail in this Court, and the Declaration sets forth, That the Plaintiff in Michaelmas Term obtained Judgment against their Principal, and that in Easter Term before the Defendants became Bail by Recognizance conditioned, &c. in Placito præd'. And to this it was objected, that it did not alledge that there was any Action pending in Easter Term.

Common Form of declaring upon Recognizance against the Bail. Vide ante 157. Post 197.

But per Cur'. It is well, and the common Form in Sci. fa. is so; ideo it will be as well in Debt upon the Recognizance.

Judic' pro Quer'.

Harvey *versus* Broad.

Vide ante 148, & post 196, 250, 251, &c.

2 Salk. 626. S. C. S. C. cited Ld. Raym. 1066.

WRIT of Enquiry was returnable Tres Trin', which happened to be on a Sunday, so that the Essoins were kept on the Monday; the Writ is returned to have been executed the 14th of June, which was the Day after the Return, viz. Monday. And tho', per tot' Cur', without Doubt a Writ may be executed on the Day of its Return, yet if that Day be such a Day as it cannot be legally done on, they shall

If a Writ may not be executed on Day of Return legally, it shall not the next Day. Fitz G. 95. Ld. Raym. 353, 1142, 1557.

Vide antea
81, 41, 148.
1 Leon. 242.
Post 252.

Shall not do it the next Day? And the Kalendar is Law, of which we as Judges must take Notice, and such a Fault may be assigned for Error Ore tenus at the Bar: And the Distinction in the Books that we ought to take Notice of immoveable, but not of moveable Feasts, is vain, for we know neither one nor the other, but by the Almanacks; and we are to take Notice of the Course of the Moon.

But at the Importunity of Hall, Serjeant, they gave Time to speak to it upon this Point, viz. Whether it not being assigned on Record, but only Ore tenus, the Court were bound to take Notice of it? Vide post 196, & ante 148.

1 Salk. 75.
S. C.

Oates *versus* Bromell.

Vide ib. 69,
ante 82.
Post 176.
Debt upon
Bond to per-
form an A-
ward, *Ita*
quod, &c.
Null Award
pleaded, and
Parol Award
set out, ready
to be deli-
vered, &c.
Ld. Raym.
115, 247,
533, 1141,
1142, 1076.
1 Barnes 41,
42.
2 Barnes 53.
If a Parol
Award may
be delivered
as well as a
Writing.

DE B C upon a Bond for Performance of an Award, *ita quod* it were made and ready to be delivered to the Parties, or such of them as should desire it by such a Day: Null Award pleaded, and a Parol Award set out, and avers, That it was ready to be delivered to the said Parties: And a Demurrer; for the Words, ready to be delivered, per Brotherick, necessarily import, that the Award was to have been in Writing; and he quoted a Case in the Common Pleas, Trin. 1^o Regin' int' Wood & Ardift, in the very Point: And insisted much upon Hungate's Case, 5 Co. 103. where the Condition of the Performance was, *Ita quod Arbit' fiat & deliberetur utrique partium*, there being two Defendants; and held, that a Delivery to one of them was insufficient, yet if it could be a Parol Award, a Publication of it to both would be sufficient.

Salkeld contra. Parol may be delivered as well as a Writing; as in common Parlance to deliver a Message, to deliver himself well; when a Man expresses his Thoughts gracefully: And Delivery is to be understood *secundum subjectam materiam*; if it be of a Writing, it must be a manual; if of a Parol Matter, it must be an oral Delivery: And relied on Dyer 218. Pl. 5. Co. Ent. 126. full in the Point; and 3 Bulst. 311. Capell v. Rogers; and that Benloe's 97. which seems to differ from Dyer, is very obscure in his Report of the Case.

Vide ante 82.
2 Cro. 541.

Holt, Ch. J. There are two distinct Things to be done: 1. The Making: And, 2. To be ready to be delivered: If it had been, so as the said Award be ready to be delivered, it might be well: If it were in Writing, it would suffice to say, That it was made; for what is made in Writing, then is ready to be delivered, because then it is deliverable: But the Question is, Whether a Parol Award be properly deliverable; or whether we shall not understand the Meaning of the Words, ready to be delivered, to be a Delivery in Writing: And he and the Court seemed clear it should be so understood.

How the
Words [*ready*
to be deliver'd]
are to be un-
derstood.

But another Day Holt, Ch. J. having seen the Case above in Dyer, and the Record of it in Co. Ent. said, They were very strong Authorities for the Plaintiff, and that the Award might have been made behind the Parties Backs, and delivered, viz. pronounced over again

again to their Faces; and if so, what may be delivered, may be ready to be delivered: And that the Case, as it is in Bendloe's, had neither Head nor Tail to it.

Powel. If the Words had been only, so as it be made and delivered, I would take Delivery to be only to give the Parties Notice of the Award; but ready to be delivered, I think must be a Delivery in Writing; and if Issue were taken upon the Readiness of Delivery, how should it be tried?

Holt, Ch. Just. If it were *res nova*, I should be apt to think so too; but when I find so clear an Authority in the Case, and some Reason for it, I cannot depart from it: And so said Gould; but they would be well informed of the Case quoted lately in the Common Pleas, and no Rule was given. *Vid. postea.*

Holmes *versus* Hall:

Vide 1 Salk.
24, 27, 28.

At Guildhall, at Nisi prius, Coram Holt, Ch. Just.

Post 309.

INdebit' Assumpsit by Executor, for so much Money of Testator received by the Defendant to the Use of the Executor.

Indebit. Ass.
by Executor,
for Money
of Testator,
received to
Use of Exe-
cutor.

The Evidence was, That some Writings of the Testator came to the Defendant's Hands, which he would not deliver up to the Executor; who, to get the Writings, gave him so much Money, whereupon he promised to give up the Writings, but after refused.

And Serjeant Darnell objected, That the Plaintiff mistook his Action; for he should have brought Case upon the Special Agreement for Nondelivery of the Writings.

Obj. That
Plaintiff had
mistaken his
Action.
Ld. Raym.

Holt, Ch. Just. If A. give Money to B. to pay C. upon C.'s giving Writings, &c. and C. will not do it, Indebit' will lie for A. against B. for so much Money received to his Use; and many such Actions have been maintained for Earnests in Bargains when the Bargainor would not perform, and for Premiums for Insurance when the Ship, &c. did not go the Voyage: But it has been held, it would not lie for Money paid upon an usurious Contract, because there it was not intended it should be repaid, or any Thing done for it. Indeed, these Cases have been carried too far, viz. Indebit. for Money received to Use, and no Body would more willingly check them than I would; therefore it shall be saved you if you will, but I will not nonsuit the Plaintiff: But it appeared on the Evidence, that the Defendant pretended to the Money as due from the Testator, and would not deliver the Writings without Payment, and that the Money was given in Satisfaction of the Debt: So it was clear against the Plaintiff, and he was nonsuited.

^{1413.}
Cal. temp.
W. 3. 650.

T t

And

And Darnel quoted a Case, where he said, One had undertaken to obtain a Pardon for another, and to that End got several Sums of Money from him, but had not got the Pardon; and an Indebit. for Money to the Plaintiff's Use brought, and yet the Plaintiff had been nonsuited before Holt: Which Holt, Ch. Just. utterly denied.

1 Salk. 113.
S. C.

Langford *versus* Administratrix of Tyler.

Against Ad-
ministratrix,
who in her
Husband's
Life-time
dealt sepa-
rately in sel-
ling Tea, and
a Bargain by
her then
made.

See Skinner

349.

Ante 105,

147.

Post 230.

Caf. temp.

Mac. 6.

Gillb. Eq.

Rep. 83, 84.

Ld. Raym.

444, 1248,

1006.

1 Vern. 71,

143.

2 Vern. 118.

Caf. temp.

W. 3. 603.

Caf. temp.

An. 253.

THE Defendant, now Administratrix to Tyler her late Husband, in his Life-time used to deal in Tea, and sold four Butts of Tea to the Plaintiff at so much per Pound; who took one away, paying for it, and 50 s. over to go towards Payment of the rest. When she came for the rest, Vendor would not stand to her Agreement; and Action brought, and two Counts, one upon the Agreement, and the other Indebit. for 50 s. received to the Plaintiff's Use.

These Points were ruled by Holt, Ch. Just. 1. If Husband and Wife cohabit, and Wife deals separately, her Contracts shall charge the Husband, for Cohabitation is sufficient Evidence of Notice.

2. If Bargain be made, and Earnest given, without an express Agreement that Payment is to be made at a certain Time, the Money must be paid before the Goods be removed.

3. A Demand of the Goods without a Tender of the Money, is void, because it is not pursuant to the Intent of the Bargain, and the Earnest is only to bind the Bargain.

4. After Earnest given, the Vendor cannot sell to another; but if Vendee does not come to pay, and take the Goods, Vendor ought to come and request him to come and pay; and if he does not come in convenient Time, the Agreement is dissolved, and then he may sell.

More *versus* Rowbothom.

Caution given
in the Admi-
ralty to some
Part-Owners
of a Ship,
and there af-
terwards li-
belled upon
the Ship be-
ing lost.

Ante 12, 26,

79.

Prohibition

See Carthew

26, 166,

518.

Fitz-G. 197,

198.

Ld. Raym.

223, 235,

984, 1285.

Vide Hob.

79.

Several Part-Owners of a Ship, some whereof were against Freightting her; but by a Course in the Admiralty in such Case, for Advancing of Navigation, they decree, That the Majority shall prevail and freight, they giving the dissenting Party Caution for their Parts of the Ship against all Risques; which was done here, and the Ship being lost, the Caution were libelled against, and Sentence given in the Admiralty: And now Prohibition was moved for, suggesting, that the Caution was given upon Land, and that all Matter of Property is to be ordered by the Common Law only: And the Court seemed strong, that they had such Power; and if so, by consequence they have no Jurisdiction over the Caution as incident thereunto: Yet it being Matter of Consequence, and never yet determined, they granted a Prohibition, and directed them to declare according to their Suggestion forthwith: And though it be after Sentence, yet if they had no Jurisdiction, Prohibition ought to go: And so it was ruled.

Domina

Domina Regina *versus* Inhabit' de Cluworth.1 Salk. 358.
S. C.

THEY were indicted for not repairing a common Foot-way, and submitted by pleading guilty; and the Court, before they would set a Fine, would be certified by some of the Justices of the Peace of the Neighbourhood that the Way was sufficiently repaired, which they did. Of Repairing Highways, see Carth. 212, 451.

Submission to
an Indictment
for not repair-
ing a com-
mon High-
way.

Per Cur', If one be found Not guilty upon such an Indictment, he is quit for being fined; but a Distringas in infinitum shall go to the Sheriff against him 'till he certify that the Way is repaired.

And per Holt, Ch. Just. If one has Land adjoining on a Navigable River, every one that uses that River has, if Occasion be, Right to a Way by Bank of Water over that Land, or farther in if necessary: If a Man by Prescription be bound to repair a Way, he is not bound to put it into better Repair than it has been in Time out of Mind before.

Vide ante 3,
149.
Ld. Raym.
725, 1169,
1170, 858.

Sexton's Case.

Administratrix owing Money to A. as such, but nothing in her own Right, was arrested by him by a Writ, without naming her Administratrix; and she being thus under Arrest, gives a Warrant of Attorney to confess Judgment: Whereupon Judgment being entered, and her Goods taken in Execution, and all this appearing by the Master's Report, though there had been an Attorney by at the executing the Warrant of Attorney, the Judgment for Irregularity was set aside, and Restitution awarded; for she was in Custody without any Foundation, and under that Terror gave the Warrant. Per Cur'.

Administra-
trix, tho' not
so named,
gives a War-
rant to con-
fess a Judg-
ment, under
Terror of
Arrest.
Vid. ante 85.
1 Salk. 399,
400.
Faresl. 115,
139.Queen *versus* Inhabit' de Newnham Murrey.

An Order of Justices was, Whereas Complaint hath been made to us by the Church-wardens, &c. of A. that B. came to settle in such a Parish contrary to Law, therefore they ordered him to another Place; and quashed for want of Adjudication, that he was likely to become chargeable. Vide 2 Salk. 478, 479, 491. Carthew 28, 222, 365, 396, 516, &c.

Order of
Settlement
quashed;
ante 87, 88.
post 213,
287.Domina Regina *versus* Gold.1 Salk. 381.
S. C.

His was indicted, for that one A. a poor Boy being set out to him as an Apprentice, pursuant to the Act of Parliament, he Vi & Armis refused to provide for him; and moved to quash it:

Indictment
for refusing
to provide
for a poor
Apprentice.1. Because 5 Eliz c. 4.
Vide 1 Salk.

66, 68. Post 164. Ld. Raym. 1363. Cal. temp. W. 3. 27. Stra 1268.

1. Because it was not a Batter indictable.
2. In case it be indictable, there should have been first an Application to a Justice of Peace, and after an Appeal to the Sessions, and then perhaps for Disobedience to such Orders an Indictment would lie.
3. It is laid to have been Vi & Armis, which is absurd, it being for a Nonfeasance.

Pyne's Case.
3 Keb. 628,
686, 854,
516.
Vide 2 Salk.
491.
1 Sid. 99.
1 Salk. 67.
1 Lev. 84.
Ray. 65.
Show. 76.
3 Mod. 270.
Vi & Armis
here, Surplu-
sage, &c.

Per Cur', If this had been the Case of a common Apprentice, an Indictment would not lie: Indeed formerly it has been held generally, and by all the Judges in Pyne's Case, That the Justices could not compel a Man to take an Apprentice upon the Statute; but since the contrary Opinion has prevailed: And then when we allow them such Power, of necessary Consequence we must allow an Indictment for Disobedience to their Orders, either in not receiving, or receiving, and after turning off, or not providing for such Apprentice. And tho' an Act of Parliament prescribes an easier Way of proceeding by Complaint, as is urged, yet that does not hinder an Indictment; and tho' the Vi & Armis in this Case be absurd, yet it is only Surplusage, which will not vitiate, and refused to quash it.

Note; There is a late Act of King William's Time touching this Power of Justices. Vid. Stat. 8 & 9 W. 3. cap. 36. And see the Cases touching Apprentices in Carthew 56, 94, 162, 198, 231, 366, &c. And Skinner 98, 108, 114, 579.

Vide 1 Salk. 327. Caly *versus* Hardy, Golson & al' *Just' Pacis* of the Town of Ipswich.

Clerk of a
Market turn-
ed out of Pos-
session by
Force.

THE Magistrates of the Town had a Mind to turn the Clerk of the Market out of his Place, and procured a forcible Entry to be made upon the Market-house to get the Possession thereof from him; and the Justices of the Town being, as was suggested, in the Faction, would not inquire of the Force.

Cal. temp.
W. 3. 403,
546.
Stra. 1154,
1173, 1222.

And here, per Holt, Ch. Just. If all the Justices of a Corporation are concerned in a Force, and will not inquire of it, the next Justices of the County shall do it; for the denying to do it, is a Forfeiture of their Exemption from the County: And here a Mandamus was granted jointly and severally to all the Justices of the Town, to inquire of the Force, for the Court would suppose them all guilty.

Vide post
268.

Domina Regina *versus* Tutchin.

S. C. Id.
Raym. 1061,
1472.
1 Salk. 48,
49, &c.
2 Salk. 699.
Defendant,
Author of the
Observer,
appearing in
Court upon his Recognizance.

HE was the Author of a seditious Paper, called The Observer, and an Order of the House of Commons against him for apprehending him; and likewise a Proclamation, with a Reward for taking him up; but he absconded a long Time, but did not desist from writing on very scandalously on the Government: And now at last he
surrender'd

surrender'd himself to the Secretary of State, who bound him to appear here the last Day of this Term, and to his Good Behaviour in the mean Time, and now an Information being filed against him, he by his Counsel prayed Time to plead till next Term.

Per Cur', If he had been summoned, and not appeared, but were brought in upon the Capias, he must have pleaded instant; but appearing upon his Recognizance, he ought to have convenient Time: And now he must renew his Recognizance here, that is, give new Bail, or the same, if good, may enter into a new Recognizance; and though we do record his Appearance now, and give him Leave to go look for Bail, yet if he don't come sitting the Court, we may call him, and record his Default: And we cannot well bind him to his Good Behaviour; for it is not usual, when we proceed in order to commit a Man, to bind him to his Good Behaviour in the Interim. Vide post 268. Residuum.

Had convenient Time to plead, and find new Bail, &c.

And was not bound to his Good Behaviour.

Gawdy *versus* Pickersdale.

ERROR of a Judgment against an Executor in Rippon Court; Verdict gave the Plaintiff 3 l. Damages, 1 s. Costs, and 5 l. 10 s. de incremento: And Judgment, Quod Quer' præd' summas attingent' to 7 l. &c. de Bonis Testatoris, ac si de Bonis propriis of the Defendant.

What Errors of Judgment in an inferior Court will be allowed to be amended.

Per Cur', We will not suffer them to amend any Error in Knowledge or Skill by their Books of Minutes; yet we will allow Amendments of Errors in Fact in the Record by the Minute-Book, if it appear upon Examination to have been originally right in the Book, and not made for that Purpose.

Vide 1 Salk. 47, 50, 51, 53.

And Holt, Ch. Just. remembered the Case of Sanderson *versus* Lanier; where in Error of a Judgment in the Court of Northampton they would not suffer them to amend Præceptum fuit into Præceptum est; yet in the same Case there were but eleven Jurymen named in the Record, there being twelve in the Book, they suffered them to amend that.

Vide Hobbs 127.

The Warden and Company of Sadlers of London *versus* Jones:

At Nisi prius, Coram Holt, Ch. Just.

THEY brought Debt upon the Statute of 1 Jac. 1. c. 22. & sect. 44. against the Defendant; For that being a Sadler, he did make 500 Saddles unsufficiently and unsubstantially, contra formam Stat', and so became indebted to them in the Forfeiture. Upon Evidence, the Case was thus:

Debt brought for making 500 Saddles unsufficient, &c. for the Use of the Portugal Envoy.

The Company complains to the Envoy of a Cheat, who ordered the Defendant to go on after examining Part of the Saddles.

The King of Portugal's Envoy residing here, directed the Defendant to make him 500 Saddles for War, for the Use of the King his Master, after the Pattern of a Saddle brought for that Purpose from Portugal; the Seat whereof was covered with Goat-Skin, and stuff'd on the Outside with Straw: The Defendant makes some twenty Saddles in Imitation of the Pattern, but covered the Seat with white Allom'd Sheep Skins; and instead of Straw, stuff'd them with Hay on the Outside. The Company finding this Matter, applied to the Envoy, informing him of the Cheat put upon him: Who thereupon countermanded the Defendant for some Time, till he had examined and compared his Work with the Pattern, and after ordered him to go on, which he did: The Saddles were all made, as aforesaid, paid for, and sent to Portugal; and this Action now brought for the Penalty, and Three of the Company were disfranchised to be legal Evidence, they declaring upon a Voire dire, that they had no Assurance of being received again: And the Question was,

Q. Whether allom'd Sheep Skins be Leather within the Act 1 Jac. 1. c. 22. and it seems they are.

1. Whether allom'd Sheep-Skins were Leather within the Act? And it appears by Sect. 49. that it is if tann'd or tawed: And it appearing by Evidence, that there are two Sorts of tawing, one dry, which leaves the Fur on; the other wet, which is done with Salt and Allom; it was clear, Sheep-Skins allom'd were Leather within the Act.

If it were improper for that Use, &c.

Next Question, If it were proper for the Use that it was put to by the Defendant? And if not, Whether imploying it improperly, would bring the Defendant within the Words, Not substantially and sufficiently made up? Sect. 44.

And as to this, Holt, Ch. Just. said, That if the Jury would think it improper for that Use, he would have the rest found specially; for if these Words (as it was urged) were only applicable to the Making up and Workmanship, without Regard to the Materials, that being provided for by other Clauses in the Statute; he said, if a Sadler, &c. has bought good Leather according to the Statute; and suffer'd it to rot, and after work'd it up into Saddles, &c. he would be dispunished by that Construction.

Meaning of the Statute is not to prevent one to buy and contract for what he pleases.

2. He said, the Meaning of the Statute was to prevent People's being cheated by having ill Goods put upon them; and if this Kind of Sheep-Skins were not according to the Statute, yet if the Buyer knew it, and were satisfied therewith, it would be no Crime; for the Statute did not design to take away any Man's Liberty of using what he pleased, that is, buying and contracting for what he pleased: But the Jury found for the Defendant generally.

Neal *versus* Goulston.

DEBT upon a Bond conditioned for Payment of Money, and therefore to be specified in Taxation according to the late Act of Parliament.

Debt upon a Bond not specified in Taxation according to a late Act.

Per Holt, Ch. Just. upon Evidence, If the Certificate produced bear Date in due Time, I will not doubt but that it was then delivered, or now, that it bears but a very late Date; yet if you prove, that it was taxed in due Time, it will suffice: Or lastly, if it has not been taxed in due Time, yet if you have a Talley to produce that you have paid the double Tax for Penalty, it will do: And the Plaintiff failing in all, was nonsuited.

Vide post 184. infra.

Plaintiff failing in Evidence, was nonsuited.

And here Holt, Ch. Just. put the Case, If Obligee had been beyond Sea all the while; but resolved nothing as to that.

Osbourne *versus* Hofier. —

DEBT was upon a single Bill for Payment of 230 l. on Demand; upon Non est Factum, one of the subscribing Witnesses was produced, and gave full Evidence of the Ensealing and Delivery of the Bond. On the other Side was produced a Person of the same Name and Surname with the other subscribing Witness; who acknowledged that the Hand was very like his, but it was not his; that he never knew either of the Parties, nor the other Witness, nor could the other Witness say he was the Man; and both their Reputations being made good in Proof, Holt, Ch. Just. order'd them both to write their Names, and thereupon left it to the Jury, who found for the Plaintiff.

In Debt upon a single Bill, two Persons produced as Witnesses ordered to write their Names, and Verdict for Plaintiff.

And here, Holt, Ch. Just. ruled, That this being a single Bill, it needed no Specification according to the late Statute, because it did not carry Interest, yet directed the Jury to give Damages, viz. Interest: And where it was objected it was payable on Demand, and no Damages or Interest incurr'd till Demand, and none was proved; Holt, Ch. Just. said, That could not have been taken Advantage of upon Non est Factum, or any other collateral Issue, but should have been pleaded.

Vid. supra & post 184.

Domina Regina *versus* Carter.

HE was indicted for a wilful and corrupt Perjury; and the Indictment reciting the Record of the Trial, at which it was supposed the Perjury was committed, being a feign'd Issue out of Chancery, did set forth, That there happen'd a Discourse between

Vide 5 Mod. 343, 349, &c.

Indictment for a wilful Perjury, reciting the Record of Trial to be upon a feigned Issue out of Chancery.

Perjury.
Vide 1 Salk.

374.

2 Salk. 514.

1 Sid. 106,

237, 377,

454.

1 Vent. 182,

370.

Variance af-

sign'd be-

tween the

Record reci-

ted and the

Indictment.

Vid. tamen

Hob. 55.

& quære

Hob. 59.

Farell. 101.

1 Sid. 148,

153, 217.

195. 1

Stra. 921, 1230.

my Lord Wharton and Sir W. R. R. S. R. R. and J. S. concern-
ing the Boundary of certain Lands; and my Lord W. affirm'd A.
to be a Boundary: The said Sir W. R. R. S. R. R. and J. S. affirm'd,
that A. was not the Boundary. Whereupon a Wager was laid,
and mutual Promises were made between the Lord W. and them
the said Sir W. R. R. S. R. R. and J. S.

And now at the Trial of the Indictment, this Variance was assign'd
between the Record they took upon them to recite and the Indictment,
That the Affirmation that A. was not a Boundary, was in the Re-
cord laid to have been by Sir W. R. R. S. R. R. and I. S. whereas
the Indictment laid it to have been by Sir W. R. R. S. R. R. and J. S.
omitting R. R. so this Record now produced in the Court was not
the Record described in the Indictment, and seem'd a good Excep-
tion: For per Holt, Ch. Just. If you bring an Assumpsit against
two, and give Evidence only of an Assumpsit by one, you are gone.

Raym. 74. 1 Keb. 531. 2 Salk. 660. Cal. temp. W. 3. 139, 511. Cal. temp. Mac. 194,
195. 1 Wms. 568. 3 Wms. 196, 244, 311. Comyns 43.

Another Variance was, That in one of the Denominations of
Lands in the Record, it was Barnap, and in the Indictment Bar-
nep: Another Word in the Record was Orientati, and in the In-
dictment Orientali; and all these being in the Description of the
Record, seem'd fatal.

Record of the
Trial not en-
tered up, a
gross Fault.

But another Fault yet grosser was, That the Record of the
Trial at which the Perjury was alledged, was not enter'd up; so
it did not appear that ever there was a Trial.

1 Sid. 153,
154.

And Holt, Ch. Just. denied the Minutes of it for Evidence, and
quoted a Case where a rank Perjury had gone unpunished for ever for
that Omission; for that he said was final, so as the Party could ne-
ver be tried thereon again: But in this Case he said, That by reason
of the other Exceptions, the Indictment being Insufficient, they might
indict him anew; for an Acquittal upon a bad Indictment, would not be
a Plea to a good one; whereas if the Indictment had been good, an
Acquittal upon the last Fault had been peremptory: And here the In-
dictment being brought to Trial by the Defendant, if he have made it
up variant from what it is upon the Plea-Roll, an Acquittal upon it
will be void; and besides, the Defendant has forfeited his Recogni-
zance, whereby he was obliged to bring down the Indictment to Trial.
And whereas here were two Indictments against the Defendant, and
he had brought them down both, and put them into Court, he now,
to bring which he pleased on first, withdrew one of them.

Two Indict-
ments, and
one with-
drawn, and
Defendant
ordered to
put it in
again.

Holt, Ch. Just. ordered him to put it in again; and it was in-
sisted on, that the Queen had her Election to bring on which of
her Causes she pleased, and therefore they would bring that on
first which the Defendant would have come on last.

But per Holt, Ch. Just. It is true, the Queen has that Election
where she brings on her Causes her self, but here the Defendant
brings it on, and he is to do the first Act, and therefore has his Election;
but if you will enter a Non pros. upon that which they desire to bring
on, you thereby inforce them to bring on the other; but to oust all
Contro-

Controversy, the Defendant having put in that which he would prefer first, it was first called.

Note; Another Exception was, that the Record of the original Trial began, Memorand' quod apud W. coram Domina Regina & Johanne Holt Milite, Capitali Justic', &c. & Sociis suis, &c. Whereas there is no Court so styled, but it ought to be coram Domina Regina only.

Muriel *versus* Tracy, Jenkins, Chamberlain,
and Cornwaill.

Vide ante 36,
90, 114, 137.
Post 178, 185.
Indictment for
a Conspiracy.
Case for con-
spiring to vex
and oppress the
Plaintiff, &c.
Ld. Raym.
81, 378, 380.
1 Mod. Caf.
in L. & Eq. 45.
Vide 1 Salk.
14, 15.
5 Mod. 349.
405.
1 Saund. 128,
230.
4 Co. 14, 15.
5 Co. 56, 57.
2 Mod. 306.
Carth. 417.
Skinner 44.
Ante 100, 137.
Post 187.

IT was an Action upon the Case in Nature of a Conspiracy, where-
in the Plaintiff declared, that the Defendants, per Conspiratio-
nem inter eos habitam to vex and oppress him, did (prætextu cujusdam
Warranti from Sir S. Lovell, Recorder of London, wherein the
Plaintiff was charged by Oath of one Ashby to have assaulted the
said Ashby on the Highway, with Intent to rob and murder him) arrest
him the Plaintiff, and carry him before Chamberlain, a Justice of
Peace, who, ex persuasione of Tracy, refused to bail him, tho' good
Bail were tendered; and so Chamberlain committed him to the Pri-
son of the Gatehouse, where such and such Sums of Money were ex-
torted from him, and not said in the whole Declaration that it was
without probable Cause.

Upon Evidence before Holt, Ch. J. it appeared, That eight Years
ago Muriell being a Gentleman's Servant, and riding one Day
abroad, had fallen out with Ashby on the Road, and being in Drink,
was soundly beat by him; notwithstanding which, Ashby took out
immediately a Justice's Warrant against Muriell for an Assault and
Battery, but nothing more was done upon it. Six Years after,
some Difference arising between Muriell, Tracy and Jenkins, here in
London, Jenkins goes down to Suffolk, and at the Persuasion of Corn-
waill, prevails with Ashby to come up to London, to make the Oath
abovementioned against Muriell, which he did before the Recorder,
(whereupon the Warrant was granted) and had a Guinea from
Jenkins for his Pains. Now a Twelvemonth after Tracy being him-
self a Justice of Peace, employs the Under-keeper of the Gatehouse,
and others, to take up Muriell, and to carry him before Justice Cham-
berlain, and send him Word as soon as they took him, which accord-
ingly was done. And Tracy informed Chamberlain that he had advised
with the Recorder and other Lawyers about the Offence charged upon
Muriell, and that they were of Opinion it was not bailable; whereas
in Truth he never did ask the Question: Whereupon Chamberlain
refused Bail, and committed him. Tracy follows him to Gaol, and
directs the Gaoler to use him severely, and to iron him.

Holt, Ch. Just. As to Chamberlain, he was to blame for his Igno-
rance, but no Reason to find him guilty upon this Evidence; but for
the rest, the Circumstances of the Evidence shew it to be all one
Chain of Malice; and if the Declaration were good, the Evidence
would maintain it.

But Exceptions taken to the Declaration were: 1. That it recited a Warrant variant from that on which Plaintiff was arrested, for the Recital was absolute and positive that the Oath was, that the Plaintiff had assaulted Ashby with Intent to rob and kill him; but the Warrant was with Intent, &c. as he believes. But no great heed was had to that Objection; but Holt, Ch. Just. said, it should be saved to them.

2. Exception was, That the Declaration supposed the Arrest to be without a legal Warrant; for it was, that Prætextu cujusdam Warranti, and Prætextu was the same as Colore, and that must be taken as if no Warrant had been: But that was over-ruled; for there being an ill Use made of this Warrant, tho' it were legal, sure that were Prætextu of a Warrant.

3. If it be taken to be a legal Warrant, there can be no Conspiracy in taking up one by a legal Warrant, especially it not being laid that the Warrant was taken out without probable Cause.

And upon this Exception Holt, Ch. Just. willed them to withdraw a Juroz, for he held the Declaration ill for not alledging to have been without probable Cause: And to this the Parties consented.

Note here per Holt, Ch. J. This being Case in Nature of a Conspiracy, all might be acquitted to one, and he found guilty. Vide N. B. 277. A. 278. K. 2 Saund. 230. 1 Vent. 12, 18, 23. & Lib. Ante 16. 1 Cro. 239.

Oliviere versus Vernon.

Trover for 14
Lemon Trees
licensed to
stand in a
Lord's Gar-
den, &c.
Ld. Raym.
276.

TROVER for 14 Lemon-Trees, and the Statute of Limitations pleaded. On Evidence at Nisi Prius, coram Holt, Ch. J. it appeared, the Plaintiff obtained Leave from my Lord Brudenell above 6 Years before to have the Trees stand in his Garden at Twittenham, and that his Lordship's Gardener might take Care of them. After my Lord sold his Garden, with all his Trees therein, to my Lord Portland, who after sold the Garden, and whatever he had from my Lord Brudenell, to the Defendant, and a Demand and Refusal within six Years proved upon the Defendant.

Here it was objected, 1. That the Gardener who received the Trees first from the Plaintiff, and continued Gardener all along, and looked after and reared the Trees, could not be a Witness; for that he, in case he proved a Title in the Plaintiff, would thereby intitle himself to an Action for his Labour and Skill employed in rearing up the Trees; whereas if it went for the Defendant, he was to have nothing.

But this was over-ruled by Holt, Ch. J. 1. Because if the Gardener took Care of them as my Lord Brudenell's Servant, he was to have nothing for his Pains from the Defendant.

2. If my Lord only gave the Gardener Leave to do it for the Plaintiff, the Gardener then was so far the Plaintiff's Servant, and it never

never was doubted but a Servant was a good Witness for his Master.

He also held, that these Trees being in Boxes, and separate from the Freehold, could not pass by the Grant of the Garden, nor by the Words [all his Trees therein,] for they were not his Trees, that is my Lord Brudenell's. Nay, it would be hard to comprehend them by Construction within the Grant, if the Words had been [all the Trees in the Garden,] without there were a Schedule of the Trees intended to pass, and the Plaintiff's Trees mentioned therein. But he agreed, if they had been conveyed by my Lord Brudenell's Grant, that had been a Conversion, and being above six Peats, the Issue would be against the Plaintiff.

That these Trees could not pass by the Grant.

And besides that, the Grant of the Garden was a Determination of the Licence given to the Plaintiff, and that the Grantee might distrain the Trees Damage-feasant; but he having not done so, but suffered them to continue, was so far from a Conversion, that it was Evidence of a Licence by him. And he said, That by Grant of all a Man's Trees, Apple-Trees would not pass. Q.

Note.

And Plaintiff had Verdict.

Robison *versus* Gosnold.

A Husband discovering his Wife to be a very lewd Woman, goes away from her, and she, after having lived several Years with an Adulterer, was received into the Plaintiff's House, who entertained her as the Husband's Wife. And this Action being an Indebitatus Assumpsit against the Husband for lodging and dieting the Wife, Holt, Ch. J. at Nisi prius, held, That let the Woman be ever so vicious, yet, while she will cohabit with the Husband, he is bound to provide Necessaries for her, and is liable to Action of such as furnish her with them, for his Bargain was to take her for better for worse. In like Manner it is if the Husband turns his Wife away for her Wickedness, he remains still chargeable for her Necessaries. But if the Wife leaves her Husband, they that trust her after it is notorious that she has left him, do it at their Peril, and shall not thereupon charge the Husband. Ante 147.

And he seemed to be of Opinion, That if a Wife had run away from her Husband, and contracted Debts, and after the Husband received her, or came after her, and laid with her but for a Night, that would make him liable to the Debts. Like the Case where a Wife elopes with an Adulterer, tho' she thereby forfeits her Dowry, yet if the Husband will of his own Accord receive her again, she shall have her Dowry again.

1 Salk. 119.
S. C.
Vid. ib. 116,
118.
1 Lev. 4, 47.
1 Vent. 42.
2 Vent. 155.
1 Mod. 124.
1 Keb. 69, 80,
87, 206, 337,
361, &c.
1 Sid. 109, 425.
Husband
leaves his Wife.
Plaintiff enter-
tains her, and
brings an Ac-
tion against
Husband for
Lodging and
Diet.
Vide ante 147.
Ld. Raym.
444, 1006.
Caf. temp. W.
3. 244, 245.
372, 603.
Caf. temp.
An. 241.
Gilb. Eq. Rep.
1. 152.
1 Wms. 482,
483.
1122, 1214.

3 Wms. 269, 273. Stra. 647, 706, 875,

Post 180. S. C.

Domina Regina *versus* Cotefworth.

Spitting in the Face, a Battery.

Indiament was for Battery upon Doctor R. and the Evidence was That the Defendant did spit in his Face.

V. antea 149.

2 Keb. 545.

1 Mod. 3.

Q. 2 Rol. 545.

Tremain's

Entries 270.

Carth. 280,

491.

Per Holt, Ch. J. It is a Battery.

And per ipsum. Tho' one cannot justify a Battery by son Assault demesne, by pleading it to an Indiament, yet he may give it in Evidence upon a Not guilty, and he may be thereupon acquitted.

Hutton *versus* Mansell.

Case upon mutual Promises of Marriage, and no Evidence of her express Promise.

Vi. 1 Salk. 24.

2 Salk. 437.

438, 553.

Antea 156.

3 Lev. 65.

5 Mod. 411.

Ld. Raym.

387.

Cas. temp.

W. 3. 214.

Stra. 938.

Case was brought, laying mutual Promises of Marriage between Plaintiff and Defendant, and Breach in the Man, the Defendant. Upon Evidence, express Promise was proved upon the Man, but none on the Woman's Side.

Per Holt, Ch. J. If there be an express Promise by the Man, and that it appear the Woman countenanced it, and by her Actions at that Time behaved her self so as if she agreed to the Matter, tho' there be no actual Promise, yet that shall be sufficient Evidence of a Promise on her Side. And he remembered a Case in which he had been a Counsel in my Lord Chief Baron Montagu's Time, where it had been so ruled upon Evidence against his Client, and being dissatisfied then therewith, he put the Case to eminent Men of those Times, who all concurred in Opinion with the Chief Baron. See and Note the Case of Harrison and Cage in Carthew's Reports 467.

D E

Termino Sanctæ Trin.

Anno 3 Annæ, in B. R.

Coram Holt, Chief Justice,
 Powell, }
 Powys, } *Justices.*
 &
 Gould, }

Genner *versus* Sparks.

GENNER was a Bailiff, and having a Warrant for Sparks, came to his House, and finding him in the Yard, told him he had a Warrant for him, and pronounced the Word of Arrest, but did not lay his Hands on him: Whereupon Sparks snatched up a Pitch-fork, and kept off the Bailiff, threatening to kill him if he came nigher; and thus retreated into his House, and shut the Door against the Bailiff. Upon all this appearing on Affidavit, Conyers moved for an Attachment upon the latter against Sparks, supposing this to be a Rescous, or at least a great Contempt of the Queen's Writ.

And per totam Cur', here was no Arrest, the Bailiff having not laid Hands on the Defendant; for his shewing the Warrant, and pronouncing the Word Arrest, without touching him, was no more an Arrest than it would be one if a Bailiff sees a Man look out at a Window a Pair of Stairs or two high, and tells him he has a Writ for him, and says, that he does arrest him; and therefore in such Cases the Bailiff cannot break the House to come at the Person, as he could lawfully do if he had been his Prisoner, and had escaped into a House from him. But it was agreed, If here he had but touched the Defendant even with the End of his Finger, 'it had been an Arrest, and he might have broke the House after to seize upon him, and an Attachment might go for the Rescous: As if a Bailiff have a Warrant against a Person who is in a House, and lays Hand upon him

him through the Window, he may after break the House to come to him. It was likewise agreed, That the Bailiff had the Protection of the Law; and therefore if he had ventured on here, and had been killed by the Defendant, it had been Murder in him; or if the Defendant had beat or hurt him, he might have his Action: Or in this Case, if the Defendant were within Reach of the Bailiff when he pointed the Pitch-fork at him, he might have his Action of Assault against him; so if he had presented a Gun at him at such a Distance as the Shot would reach him.

Attachment
denied.

And per Cur', the Motion was denied.

1 Salk. 266.
S. C.

Error assigned
for Want of an
Original.

1 Salk. 264,
266.

Vid. post 206,
207, 235.
Ante 113.

Burnaby *versus* Sanderfon.

ERROR of a Judgment in the Common Pleas, and Want of an Original assigned for Error, the Defendant comes in ad audiend' Errores gratis, alledges Diminution, and has a Certiorari: Whereupon a variant Original is certified; at the Day given he comes again, and suggests a right Original of such a Term, and prays a new Certiorari to certify that, and pleads In nullo est Erratum.

Of Certiora-
ries, &c.

See Skinner

419 to 422.
1 Salk. 144
to 151.

And all this Fact appearing on the Report of the Master, per Holt, Ch. J. The Defendant is right in Point of Law; for suppose the Record below be of Easter Term, and after Judgment, Writ of Error is brought here, and Want of Original, or Variance in the Original be assigned for Error, and the Defendant alledges Diminution, the Certiorari there is only to the Custos Brevium to certify an Original of Easter Term, viz. the Term of which the Placita are; and if he either certify that there is none, or certifies a wrong Original, the Defendant in Error, before In nullo est Errat' pleaded, may suggest that there is an Original of another Term, viz. of Hill. Mich. or other Term; and there shall go two Certiorari's, one to the Custos Brevium to certify that Original, and another to the Chief Justice to certify an Entry of the Continuances: And this has been carried further; for if the Custos Brevium return a wrong Original, or a variant one on the first Certiorari, of the Term of which the Placita are, he may suggest that there is a right Original even of that very Term, and have a new Certiorari: And when both Originals are before the Court, they will intend that to be the right Original which agrees with the Declaration; to which all the rest agreed: But because in Point of Practice there ought to have been Notice to the Plaintiff of this Suggestion, and the new Certiorari ought to be filed in the Office which was not done here, so that the Judgment by that Irregularity was affirmed, sooner than otherwise it could have been, the Court did discharge the Rule for Affirmance of the Judgment, and directed the Defendant to proceed regularly: So he was forced to move to have it read as a Record again, and have it made a Consilium for to come regularly on.

Judgment
affirmed.

And the Judgment after was affirmed per tot' Cur'.

Domina

Domina Regina *versus* Crisp.

HE was indicted, for that there being an Account stated between him and A. whereby he was indebted in such a Sum to A. which Account he signed, and that he got it into his Hands per falsas & falsas Insinuationes, and Vi & Armis tore it contra Pacem, &c.

Indictment for tearing an Account after it was settled. See 2 Salk. Tit. Indictments.

Caf. temp. W. 3. 413, 255, 454, 502, 504, 602. Stra. 595.

And Eyres moved to quash it: 1. Because it was a private Offence not indictable.

2. Because it did not shew whose the Property of the Paper was; but the Court denied the Motion, for it was a Trespass now ab initio. A Trespass ab initio, &c. Ld. Raym. 366.

3. The Property is his, who was intitled to the Debt on the Account; and they bid him try it, or demur at his Peril. Where Account will not lye but Trespass, see Carthew 89. 1 Salk. 9.

Per Cur', One may file a Bill against an Attorney any Day within the Term; and if there be four Days of the Term to come, one may serve Rules upon it that Term: But if the Declaration be in Easter Vacation, which is indeed a Declaration of Easter Term, the Defendant shall have four Days in Trinity Term to plead, and one is not confined to four Days to plead in Abatement, but he has the whole Term of which the Declaration is delivered; but if he has four Days in the Term of which the Declaration is, he shall not plead in Abatement the next Term. Vide 2 Salk. 515, 517, 519. 1 Salk. 1. Lut. 24. When a Bill may be filed against an Attorney. Ante 106. 2 Salk. 544. Caf. temp. W. 3. 504, 522. Caf. temp. Ann. 2. 1 Mod. Caf. in L. & Eq. 43. Stra. 1192, 523, 532. Time to plead in Abatement.

— *versus* Croket.

AN Assumpsit laid in Staffordshire, and the Declaration of Easter Term: And Chetham moved to change the Venue into London upon the common Affidavit; but had no Affidavit, as the usual Course is, of the Time of which the Declaration was delivered. 2 Salk. 669. S. C. Motion to change Venue, but no Affidavit of Delivery of the Declaration, &c.

And per Holt, Ch. Just. The Reason of that Course is, for that if the Action were laid in London or Middlesex, perhaps by the Rules of the Court the Plaintiff should have a Plea to enter; and therefore it is necessary to satisfy the Court that the Declaration was not delivered so long ago as that the Plaintiff could be intitled to a Plea to enter, to obtain the Change of the Venue: But this being a Country Cause, and the Declaration of Easter Term, in which Case, tho' it were delivered the first Day of the Term, he could not have a Plea to enter, he thought this out of the Reason of the Rule, and therefore an Affidavit unnecessary; but here, because if the Action were laid in London, there must be fifteen Days between Teste and Return of Process: So the Plaintiff could have no Trial till Michaelmas Term, the Court held him up to the Rule. Party held up to the Rules.

1 Salk. 75.
S. C.
Vide antea
160.
So as the said
Award, &c.

Oates *versus* Bromhill. Pasch. 3 Annæ.

Obj. That the
Words intend-
ed more than
a bare pro-
nouncing and
the Parol A-
ward, as here,
ill on Demur-
rer.

Obj. 2. To the
Averment of,
ready to be deli-
vered to both,
&c.

Ld. Raym.
115,247,533.

Per Cur', A
Parol Award
is capable of
Delivery, and
how.

Parol Award
need not to
be notified to
both Parties.

The Case coming on in the Paper this Term, Brotherick in-
sisted very much, that the Condition in the Submission, So as
the said Award be made, and ready to be delivered, and given up to
the said Parties, or such of them as should desire it, were of some
Use, and put in for some Purpose, and must be intended of another
Delivery than the bare pronouncing of the Award: And yet if, ac-
cording to Dyer, ready to be delivered, be only to be pronounced or
declared by an Oral Delivery, the adding those Words in the Condi-
tion would signify nothing; for then, as soon as it is made by the Ar-
bitrators, it is ready to be declared or pronounced by them; and he
insisted on the Case of Wood and Arditt in the Common Pleas, Trin'
1^o Annæ, where the Condition of the Submission was in the very
same Words as here, and a Parol Award set out as here, and ad-
judged on Demurrer to be ill per tot' Cur', notwithstanding the Case
in Dyer had been urged; the Report of which Case he had from Tracy
one of the Judges of the Court, and the Roll whereof he had perused.
Another Matter he insisted on was, That the Averment was, that
the Award was ready to be delivered to them both, without saying
[and either of them;] for it may be, the Arbitrators were ready to
declare it to both of them if they had come together, but not to one
of them: He also objected, That in the Award set out it was ordered,
that præfat. A. (for the Purpose) one of the Parties, solveret præfat.
B. the other Party, præd Summam of 10l. and there was no Sum
of 10l. mentioned before.

But per tot' Cur', Upon great Consideration, notwithstanding the
said late Case in the Common Pleas, a Parol Award is capable of a
Delivery, viz. a Declaration of it to the Parties, or either of them,
if they desire it; and that being so, as soon as the Arbitrators have
agreed on the Award, it is ready to be delivered, and the Readiness
of Delivery needed not to have been averred, because the Alledging an
Award made imports it; nor is the Condition in the Submission there-
fore vain, for if after the Award made, the Parties, or either of them,
had come and asked the Arbitrators what Award they had made, and
they had refused to tell, then he might plead that it was not ready to
be delivered, shewing that Matter: So perhaps, if the Arbitrators had
died in so short a Time after the Award made, as the Party could not
have convenient Time to ask them; for the Intent of the Condition
was, That the Parties should have Notice of the Award; and it is not
essential to a Parol Award, that it should be notified to both Parties.
And as to the præd' Summam, tho' it was agreed præd' could not with-
out a Tautology be applied to B. the Party, because of the Word
præfat. before given him; yet because in Sense it could not be applied
to Summam, there being no Sum mentioned before, they all agreed,
that they would make a Comma after præd' and so join it to the Party,
rather

rather than suffer it to go to Summam to vitiate the Award; and where a præd' may refer in good Sense to either of two Antecedents, there it may vitiate, because of Incertainty; but where it has but one thing to refer to, and joining it to that would make it Non-sense, it shall be rejected as idle. Vid. 2 Vent. 242. 3 Bulst. 311.

Et per tot. Cur', Jud: pro Quer'.

Judgment
pro Quer'.

Fazakerly *versus* Baldoe.

1 Salk. 341,
352. S. C.
Quare 5 Mod.
156.

UPON a Return of an Habeas Corpus from London, a By-Law was set forth, laying a certain Penalty upon any Freeman that should sell Goods usually sold by Weight not having weighed them by the City-Beam, grounded upon such a Custom in London.

Vide ante
123.
Upon an Hab'
Corpus a By-
Law of Lon-
don is return'd
for Freeman
to weigh
Goods at the
City Beam,
&c.
Ld. Raym.
498.

And now Parker and Eyre moved to have the Return filed, for that without it were filed the Defendant could not bring an Action of False Return, and then there would be no Way to controvert the Being of such a Custom; so they might return what Custom they pleased, falso & impune: And as to the objecting, That after the Return filed there could not be a Procedendo; they answered,

1. That true it is, a Record once filed in that Court shall never be sent back; but that is to be understood in another Term, but in the same Term it comes in it may. 1 Lev. 93. 1 Roll. Rep. 85.

2. Though it were true, that a Record once filed here could not be sent back the same Term; yet this being a Return of an Habeas Corpus, which removes not the Record, nor any of the Proceedings below, but only certifies a History or Tenor of the Record, the filing thereof cannot hinder the Court from awarding a Procedendo to enable them to proceed below. 1 Keb. 170. And if the Plaintiff would proceed here above, he must begin de novo with a new Bill against him in custodia Mareschalli.

Holt, Ch. Just. The Practice has always been in this Court to award a Procedendo without filing the Return; but the Question is, Whether the filing the Return will be a Hindrance to our granting a Procedendo? It is true, by Habeas Corpus all Proceedings below are suspended till the Court has determined of the Right of the Cause of Detainer upon the Return; and if they had proceeded below in the mean time it would be all void, and coram non Judice; so that it will be necessary to award a Procedendo to unty their hands below: But why we may not grant a Procedendo after the Return filed, I cannot see, for there is a Difference in this Respect between Habeas Corpus and Certiorari; upon Habeas Corpus we have not the Record it self here as we have upon a Certiorari: And where a Record is removed hither, and filed here, it shall never be sent back, not even in the same Term in any Case whatever, except in Case of Felony; And that by the Statute of 6 H. 8. c. 6. whereby if one remove

his Indictment for Felony up hither, we may remand him back after it is filed, to the County where it is to be tried by the Judges of Jail-Delivery there: If we grant an Habeas Corpus to bring up a Prisoner charged criminally from Newgate, and the Return is filed; yet if we adjudge the Return good, we remand the Prisoner, and the Jurisdiction of the Judges of Jail-Delivery, which is suspended by the Habeas Corpus, is revived by the remanding him back: But upon Writ of Error of a Fine, the very Fine is never certified hither, but only a Transcript of it; and if the Court adjudge it erroneous, they send a Certiorari to the Chirographer to certify the Fine it self, and it is actually cancelled here: And after they had taken Time to consider, per Cur. it was filed, and a Procedendo awarded.

S. C. ante 11.

1 Salk. 266.

Post 213,

239.

Vide Black.

Cases 287.

Stra. 849,

1246.

The ways to

bring Writs

of Error of

Judgment

upon Indict-

ments against

common

Scolds, & al.

Ante 11.

Post 213,

239, 311,

&c.

1 Salk. 149.

1 Vent. 53.

So in case of

Error from

Ireland.

Domina Regina *versus* Foxby.

SHE was convicted by the Justices of Peace at their Quarter-Sessions at Maidston, upon an Indictment for being a common Scold, and Judgment that she should be ducked: Whereupon she brought a Writ of Error, having obtained a Warrant for that Purpose from the Attorney General; and hereupon the Sheriff let her go at large, there being no Fine or Imprisonment in the Judgment.

Per Cur', She must assign Error in Person; and the most usual Way of bringing Writs of Error of Judgment upon Indictments, is to remove the Record into the Crown-Office by Certiorari, and then bring a Writ of Error coram nobis; but one may directly remove it by Writ of Error, and either Way was good, but after Writ of Error the Course is to serve a Rule in the Office to assign Error; and if they fail, to have a peremptory Rule, which must be upon Motion, and upon Default in that, to nonsuit them upon the Writ of Error, and award Execution.

Vide ante 30,

114, 169.

For causing

M. to be ar-

rested and

committed to

Gaol, laid in

Irons, and

then extort-

ing Money

from him.

Vide ante 90.

Domina Regina *versus* Tracy.

HE was again indicted, for that he, together with Taylor and Jeoffreys, with Intent to oppress Muriell, falso, nequiter, &c. did at the Parish of St. Giles in Com. Middlesex, get Muriell arrested, by Pretext of a certain Warrant from the Recorder of London, reciting the Substance thereof, as before; and that after he was arrested, they brought him before Justice Chamberlaine, in the Parish of St. Margaret's in the said County; and that Tracy did there, with farther Intent to oppress him, falso, maliciously, &c. perswade the said Just. Chamberlaine to refuse Bail for him, though sufficient Bail were then tendered to him, and procured him to refuse the said Bail, and to commit him to Jail, and avers the Refusal of Bail and Commitment; and likewise that Tracy did perswade and procure Taylor and Jeoffreys to lay him in Irons, and use him severely; and that they did threaten to Iron him, and by that Means extorted 5 l. from him: He having

having enter'd into a Recognizance to try this Indictment, the Venire was made from the Parish of St. Giles only, and after Verdict and Conviction, it was held a Mistrial; for here being several Facts arising in several Parishes, the Venue ought to come from both, and so Judgment could not be given upon the Indictment. But the Court held that he had forfeited his Recognizance, for he had not tried the Indictment, for it must be a Trial with Effect on which the Court may proceed to Judgment; for if we do not estreat the Recognizance, every Defendant will wilfully make Faults, so that they shall always go unpunished, and we may award a Scire fac' upon the Recognizance here in this Court, and determine it our selves, or have it estreated into the Exchequer. And a new Ven' fac' was directed, and the Defendant forced to give a new Recognizance, or he must have gone to Jail.

A Mistrial.
Vide ante
142.
Salk. 649.

A new Ven'
fac', and a
new Recogn-
izance.

Note; Here it was said, That it being a Fact in Middlesex, the Ven' might be made returnable de die in diem, and it being quash'd, they might date the new Ven' on the Day of Return of 1st; and being again convicted upon a new Ven', it was now moved in Arrest of Judgment by Eyre, that here was no Offence in the Indictment: 1. The taking a Man up by Virtue of a lawful Warrant is lawful, and cannot be maliciously, or with ill Intent, and quoted 1 Cro. 608. And the other Part, viz. perswading Chamberlaine to refuse Bail, was only his Opinion, which though false, yet not punishable: And as to the Extortion in Jail, it did not appear to have been by his Direction.

Obj. That
there was no
Offence in the
Indictment.

But per Cur', If a Man gets another wrongfully put in Jail, and there the Keeper extorts Money from him, he that wrongfully put him in, is guilty of the Oppression of taking the Money. If a Man falsely imprisons J. S. and the Jailor detains him 'till he pays so much Money, he shall have his Action of False Imprisonment, and taking so much Money from him, against such Person: So here, though the Warrant be legal, yet if one, with Intent to oppress a Man, gets him taken up by this Warrant, and follows him to a Justice of Peace to hinder his being bailed, it is illegal; and it is illegal to use a lawful Means for Oppression; and it is an Offence in a Justice of Peace to refuse Bail in case of a common Misdemeanor; and it suffices to say in the Indictment, That sufficient Bail was tender'd; without saying, That the Party knew them to be sufficient: And here it was said, that Tracy did perswade Chamberlaine to commit him, and that he did commit, without saying, that it was super inde; yet held well.

And per Holt, Ch. Just. If one be taken by a Process from Sessions to the Sheriff, he must give Bail-Bond according to the Statute of H. 6. and where-ever one may be taken up by Warrant of one Justice, any one Justice may bail; formerly indeed none could be taken up for a Misdemeanor 'till Indictment found, but now the Practice over all England is otherwise.

Modern Prac-
tice of taking
up the Party
before Indict-
ment found.

And per Hale, That Practice is become a Law, and Justices of Peace eo ipso may bind to Peace, and over to Sessions, for any Breach of Peace before an Indictment found.

Domina

Vide 2 Salk.

477, 488.

S. C. Ld.

Raym. 1157.

Order of two

Justices re-

cites Oath

before one of

them, by the

Mother [of a

Bastard] who

was examined

by one of

them, and ill.

2 Salk. 488,

489.

Ld. Raym.

55, 1198.

Domina Regina *versus* West.

AN Order of two Justices did recite, That whereas Oath was made before one of them by the Mother of a Bastard, that B. was the Father of it; and that by Examination of her by one of them, it did appear that B. was the Father, therefore they adjudge him to be so, and order him to pay so much.

Per Cur', The Examination is a Judicial Act, and ought to be by both; and not enough that one of them should examine, and make a Report to the other: But if they be both present, and one alone examines, that will be well; for there the Examination of one is the Examination of the other.

And per Holt, Ch. Just. Where two Justices of the Peace are ready to bail one, they ought to be both present to do it; and not enough that one of them should first sign the Recognizance, and then send it to another, tho' the contrary be sometimes irregularly practised: And here the Order was quash'd, and the Party bound over to appear at the next Quarter-Sessions.

This Order
quash'd, and
Party bound
over.

2 Salk. 475.

Note; The Party must be present in Court in this Case, when the Motion is made for quashing the Order.

Vide Gazett,
May 24, 1718.

Per Holt, Ch. Just. The Martial Law is not a fix'd, but a transitory Law, variable by the General, as Occasion and Circumstances require, according to the Articles of War.

Ante 172.

S. C.

Domina Regina *versus* Cotesworth.

Exception to
the Caption
of an Indict-
ment.

EXception was taken by Montague to the Caption of an Indictment, that it was presented per Jurator' Elect' triat' Jurat' & Onerat' ad inquirend' pro Domina Regina (&) Corpore Com', instead of (pro) Corpore Com': Which was agreed per Cur' to be the right Way, but they held it well notwithstanding; for it is good Sense that they were charged to inquire for the Queen, and in Behalf of the County.

Return of
Hab' Corp'
to remain
in Court.

Per Holt, Ch. Just. Let it be a Rule for the future, That when one is brought up by Habeas Corpus, the Return remain in Court, and a Copy of it only given to the Marshal; and so of a Committitur.

Excommuni-
cation and
Outlawry to
be produced
under Seal.
Stra. 520.

Per Cur', If an Excommungement in the Plaintiff be tender'd for Plea in Abatement, tho' it be signed by Counsel, by the Court of Court 'tis not to be received unless it be produced under Seal, tho' the Plea need not mention that it is so produced: And so of an Outlawry.

Jenkins & Uxor *versus* Plombe. Pasch. 3 Annæ.

Ante 91. S. C.

THE Court having taken Time 'till this Term to consider of the Case, declared unanimously, That in this Case the Defendant ought to have Costs; upon this Ground assign'd by Holt, Ch. J. That if the Plaintiff, having married the Executrix, had ordered, as he might have done, J. S. to receive this Debt which was due to the Testator, and he had accordingly received it, that had been a good Payment and Discharge of the first Debt; and J. S. would now become indebted to the Plaintiff by a Contract in the Plaintiff's Time, viz. the Appointment and Receipt; and he in that Case might bring an Indebitatus Assumpsit against J. S. for so much Money received to his Use as Executor: And here, tho' the Defendant received the Money without any previous Appointment of the Plaintiff, yet the Plaintiff by bringing this Action, having * assented to the Receipt, it amounts to an Appointment, and a Discharge of the first Debtor, and makes a Contract between the Defendant and him: And here the Plaintiff needed not have named himself Executor, it being upon a Contract with himself; his saying that it was to his Use as Executor, is true, and therefore no Harm, but rather better, for it shews how the Right came; for if here he had been an Administrator instead of Executor, and declared as such and recovered, and then Administration had been revoked, the Defendant would be relievable by Audita querela.

Vide 1 Salk. 207.
Ante 94.
Carth. 297,
254, 386.
That Defendant ought to have Costs upon Plaintiff's being nonsuited, tho' he declared as Executor, &c.
Ld. Raym. 224, 443,
437, 865,
1413, 1308,
1371.
Caf. temp. W. 3. 440.
Caf. temp. An. 135,
174, 256.
Caf. temp. Mac. 276,
277.
1 Mod. Caf. in L. & Eq. 108.
3 Wms. 347,
Stra. 682, 977.

373. Comyns 162. 1 Barnes 90, 93, 95, 103, 110. 2 Barnes 99, 106, 100, 102, 122. 871, 188. * That the Plaintiff's assenting to the Receipt, amounts to an Appointment, and Discharge of the first Debtor, &c.

And it is a true Rule, That where the Executor need not name himself Executor, he shall pay Costs upon a Nonsuit, and the naming himself Executor shall not exempt him from it: And where Executor recovers in a Case in which he need not name himself Executor, and dies intestate, or makes his Executor, who will not prove the Will. As to the first Testator's Goods, his Executor or Administrator, and not the Administrator de Bonis non of the first Testator, shall sue Execution, and would be liable to the Costs of a Nonsuit of him, and not the Administrator de Bonis non: And though here the Executor should bring the Action in his own Name, yet the Debt recovered are Assets in his Hands. If Executor lives at London, and Goods which Testator died possessed of are at Bristol; yet the Executor has such immediate Possession of them, that he may maintain Trover for them in his own Name against any Converter of them, and the Damages recovered shall be Assets in his Hands; but if he does not recover so much in Damages as really the Goods were worth, and that happens not thro' any Fault of his, he shall answer for no more than he recovers; as if the Goods be perishable Goods, and before any Default in him to preserve them, or sell them at due Value, they are impaired, he shall not answer for the first Value, but shall give that Matter in Evidence to discharge himself: But if one takes Goods out of his Possession, he must sue him that took them, to have an Opportunity of discharging himself of answering more in Assets than he recovers: So if Executor will omit to sell the Goods at a good Price, and after they are

That where an Executor need not name himself Executor, he shall pay Costs upon a Nonsuit, &c.

Vid. Hob. 218.

Where an Executor shall answer for no more than he recovers, and where the Value of the Goods shall be Assets.

A a a

taken

Vide 1 Salk.
116, 117.
Preced. Chan.
49, 173,
273, 540.

taken from him, there the Value of the Goods shall be Assets in his Hands, and not what he recovers, for there was a Default in him. And in this Case, if the Receipt was by the Defendant after the Plaintiff's Marriage with the Executrix, the Husband alone should have brought the Action; but if the Receipt were in the Wife's Time, before the Marriage, the Husband and Wife ought to join in the Action: So per tot. Cur. Defendant must have Costs.

Action arising
Part in one
County and
Part in ano-
ther.

Per Cur'. If Cause of Action arise Part in one County and Part in another, Plaintiff has Election in which of the Counties to lay it, and in that Case the Defendant shall not upon the Common Affidavit change it; but where the Cause of Action is transitory, and the Plaintiff does lay it in another County than in that in which it did in Truth arise, and the Defendant by the common Affidavit would change it into a different County, the Plaintiff shall not come and say that it did arise in another County, and be bound to give Evidence there.

Vide 1 Vent.
17.

Ante 99. S. C.
1 Salk 380.
Vid. post 289.
Indictment
for enticing
an Appren-
tice to depart
is naught.
Vid. Pop.
135.
2 Rol. Abr.
75.
Skinner 11.

Domina Regina *versus* Daniel.

PER totam Curiam, this Term, the Indictment is naught.

1. The enticing an Apprentice or Servant to depart from his Master, is not an Offence of a publick Nature, but the Party's Remedy is by an Action upon his Case, which he may well maintain. Vide Noy 105.

2. A common Action of Trespas will not lie for enticing an Apprentice or Servant from his Master. But if one will take away my Servant or Apprentice by Force, Trespas will lie for the Master, declaring upon the Force, per quod Servitium amisit.

3. Here it does not appear whether he were a Servant or an Apprentice, and a manifest Difference is taken in 21 H. 6. 23. between a Servant and an Apprentice. An Apprentice must be by Deed, a Servant may be by Parol Contract. An Apprentice cannot be discharged but by Deed, but Servant may by Parol.

4. The enticing to embezel his Master's Goods has no Venue to it, and therefore that is bad.

5. Procuring to depart and absent himself from his Master's Service is bad, without positively averring that he did depart. Per Powell.

6. Per Powys. It ought also to appear how long the Absence or Departure continued, for here, for ought appeared, it might be but for half an hour.

And per Omnes. The Precedent in Rastall is perfect Nonsense, for it was, That the Defendant procured his Servant to leave him, and that he was a common Procurer of Servants.

Farell. 52.
1 Mod. 71.
2 Keb. 24,
687.
1 Sid. 282.

Vide post 311. That Communis Deceptor, Oppressor, Perturbator, &c. are too general. So is Communis Lena. 1 Salk. 382. Communis Poculator, Jurator, &c. Farell. 52.

Grant

Grant *versus* Southers *Mar'*.Vide ante
113.

Grant had been in Custody of the former Marshal, and voluntarily suffered to escape by him, and he after came voluntarily and returned, and being found in Custody by the succeeding Marshal, was detained by him. Whereupon he having brought an Action of False Imprisonment, the Court granted an Imparlance till the next Term, affirming at the same Time that it was lawful to detain him, and that to suffer him to go at large would be an Escape in the Second Marshal; and that Hale had been of the same Opinion. And they declared they knew no such Thing as a perpetual Imparlance, tho' they had known perpetual Injunctions.

One voluntarily suffered to escape, voluntarily returned, and being detain'd, brought an Action. Stra. 423. Vide Hob. 202. contra.

Domina Regina *versus* Steer & al'.Vide 2 Keb.
178, 594.

THEY were indicted, for that at such a Place in Com. Suff. Vi & Armis, in the Defendant's Pond illicitè & injustè piscerunt cum Retibus, and so many Carps de Bonis & Catallis of the Prosecutor did take and carry away.

Indictment for Fishing in his Pond.

And moved by Broderick to have it quash'd:

1. For the Insensibility of the Word Piscerunt.
2. For that these being Fish in a Pond, they could not be Bona & Catalla of any Person.

Per Cur'. The Insensibility of the Word Piscerunt would not have vitiated, had the Taking and Carrying away of the Fish been well laid.

2. If a Man has a close Pond in which there are Fish, he may call them Pisces suos in an Indictment, or he may not do it, at his Pleasure, and either Way is good; because being in a close Pond, the Property (Ratione Loci) in them cannot be lost, because they cannot swim away; but notwithstanding he cannot call them as Bona & Catalla, if they be not in Trunks, and for that the Indictment is bad, but however not fit to be quashed on Motion, the Offence of Fishing in other Mens Ponds, and taking away their Fish, being too great to receive so much Countenance.

Vide 2 Salk. 637.
2 Keb. 178.
3 Mod. 97.
Ld. Raym. 239.

Note; per Cur'. There needs no Privilege to make a Fish-Pond as there needs in Case of a Warren.

Per Cur'. One cannot declare against a Corporation aggregate, as in Custod. Mar'.

Corporation. Ld. Raym. 79.

Cas. temp. W. 3. 559, 672. 3 Wms. 426. Stra. 612, 614, 1241.

Per Cur'. One is indictable for setting up a Market or Fair, or Leet. For Declarations by or against Corporations, See Skinner 2, 154.

To set up a Fair, Market or Leet, indictable.

1. It Ld. Raym. 149.

1. It is an Usurpation upon the Queen, for which she may bring a Quo Warranto, where there may be two Judgments, the one for Seizure of the Franchise into the Queen's Hands, the other for a Fine for the Usurpation; and to keep a Leet to summon the Subject to make Presentments, and to amerce, is a Grievance to the People besides. So of Fair or Market, if they take Toll of People.

Per Holt, Ch. J. at Nisi prius. If Bond be for 400l. with Condition to pay 200l. at a Day, without Mention of any Interest to be paid for the 200l. So that if the Two hundred Pounds be paid at the Day, the Bond is saved; and tho' the Money be not then paid, so that now the Obligor cannot be relieved against the Penalty without paying Interest, yet such Bond needs no Specification by the late Act of Parliament.

Ante 167, bis.

Herring *versus* Crocker.

A *Fieri Facias* to the Sheriff before Judgment entered, and the Value levied. Farfl. 37, 118. Ld. Raym. 252, 990. Cal. temp. W. 3. 146, 177.

Judgment by Confession three Terms before, and before any Entry on the Roll of the Judgment a *Fi. fa.* is taken out, and the Sheriff taking Security for his Indemnification from the Plaintiff in that Judgment, levies Goods to Value. And now another *Fi. fa.* upon another Judgment, being brought to him, he returns nulla Bona, the Goods are sold upon the first Writ, and Money paid by the Sheriff, and Satisfaction entered upon the Judgment, but the Roll not filed. The Plaintiff in the second *Fi. fa.* brings False Return against Sheriff. And now it was moved for the Plaintiff in the first *Fi. fa.* to have Leave to file his Roll.

1 Saund. 39.

Post 191.

Per Cur'. How can an Action of False Return be maintained against the Sheriff if there be no Fraud in him? And if there be, you have your Remedy notwithstanding the filing this Roll, as well as if it be not filed. The Sheriff would not be liable to the Defendant in the first Judgment in Trespass, for the Writ is enough to justify him, and he is not bound to examine any farther.

By the ancient Rules of the Court, the Judgments of one Term ought to be entered upon the Roll before the Essoin-Day of the next Term, and the late Act of Parliament for docketting of Judgments, was only in Imitation of the ancient Course, and in Aid of it.

And per Holt, Ch. J. The Common Law is, and that is indulgent enough, That all Things done in the Vacation shall refer to the precedent Term; and tho' no Inconvenience appear to us if this Judgment be now filed as of the due Term, yet we cannot foresee how far such Retrospect may affect others. And if this first Debt be a just Debt, and the Party without any Compulsion had paid it before your Writ came to the Sheriff, it had been good against you: So here, if the Debt were just, and a Writ had come to the Sheriff, and he had levied the Money, and paid it before the second Writ had come to

to

to him, it had been good against the second Plaintiff, tho' the first had no Judgment.

Therefore he advised Serjeant Darnell to consider of it again before he proceeded with the Action against the Sheriff.

And they would not grant the Motion.

Domina Regina versus Best & al'.

They were indicted, for that they being idle, scandalous, and wicked Persons, in order to oppress and defame one P. P. and to get unto themselves unlawful Gains of Money from the said P. P. they did falso, nequiter, malitiose, &c. conspire, contrive and agree among themselves, falso to charge the said P. P. with being the Father of a Bastard Child, with whom they pretended one El. C. to be then big, and that in Pursuance thereof they did falso affirm him to be the Father of it. Upon Demurrer, now Broderick took Exception,

1. That it was not averred, ubi revera he was not the Father of it, or ubi revera the said El. C. was not then with Child; and that it was essentially necessary to the maintaining such Indictment to aver that the Party was innocent. Vide 9 Co. 53. a.

2. It does not appear that any Thing was done in Pursuance of the Conspiracy, and that also ought to appear according to the Polter's Case, ubi supra, and it is so far from being false that he was the Father of the Child, that he is adjudged to be so by the Justices of Peace, and ordered to maintain it.

And if this were an Indictment for Perjury, for falso swearing that a Deed was executed by such a Party, without saying ubi revera no such Deed was executed, the Word falso would not even by Intendment import that the Deed was not executed, but only that the Party that swore it was a false Person generally; and if Issue were taken that he did not falso affirm it, the Affirmation, and not the Falsity, would not be triable.

Dee contra. The Indictment is grounded meerly upon the Conspiracy to charge falso, and this Conspiracy, with the subsequent false Affirmation is sufficient to maintain the Indictment within the express Resolution of the Polter's Case. And that a false Conspiracy, without any further Act of Pursuance, is indictable, he quoted 1 Sid. 68. 1 Lev. 62.

Holt, Ch. J. Tho' a Conspiracy to charge falso be indictable, yet the Party ought to shew himself to be innocent, for People may lawfully meet, and contrive and agree to charge a guilty Person, and to say that they met and agreed to charge falso, perhaps will not be enough, without shewing the Foundation of the Falsity, viz. the Party's Innocency. And here, if the Defendants had pleaded Not guilty, they must have been acquitted; for the Order of two Justices stand-

Ld. Raym.
1167. S. C.
1 Salk. 174.
S. C.
Ante 137.
Vi. ante 100,
& 169.
Action S. C.
for Conspiracy.
Indictment for
confederating
to charge a
Man falso to
be the Father
of a Bastard
Child.
1 Keb. 233.
254.
2 Keb. 59.
V. Hob. 219.
Ld. Raym. 81,
377, 378, 380,
381, 1169.
Caf. temp. W.
3. 248, 255,
454, 542.
Caf. temp.
Mac. 146,
216, 219.
1 Mod. Caf.
in L. & Eq.
10, 321.
Stra. 144,
193, 1227.

If the Party
ought not to
shew himself
to be innocent,
&c.

ing in Force, would have concluded P. P. from giving Evidence of his Innocency.

And the Case being spoke to again this Term, Montague for the Defendants urged, that it ought not only to appear that the Accusation was false, but that it was before a lawful Magistrate; otherwise it could not be a legal Accusation.

And if this were a Writ of Conspiracy, it would not have lain before an Acquittal, and then there would be no need of an Averment of the Party's Innocence, because the Acquittal would tantamount.

And he insisted, That if this had been for Perjury, there must be an Averment that the Matter sworn was not true, and that the falso would not serve; and for that he quoted the Case of the King *versus* Grieve.

And he took a Diversity between a Conspiracy and a Confederacy; the one must be in judicial Proceedings, the other may be in Pais. Vide the Statute of 28 Ed. 1. c. 10. but this Indictment is for a Conspiracy.

2 Inst. 561,
562.
1 Mod. 220.

But of the other Side was quoted a Precedent out of West. 2. p. 102. §. 97. agreeing with this: It was for conspiring falsely to charge one with Felony, without any Averment that he was innocent. Vide 42 Ed. 3. 15. In Conspiracy laid in one Place to charge with a Fact in another County, and the Venue came from the County where the Conspiracy was laid.

The Case of
Perjury not
like this.

Per Holt, Ch. J. Your Case of Perjury is not like this, for there the Crime meerly consists in the Fact sworn, and the Matter is indifferent till the Averment of *ubi revera* comes: But here is a Confederacy to charge a Man falso, nequiter, malitiose, &c. and tho' the Word confederaverunt be not in, yet there are the Words machinaverunt & aggregaverunt, which are as full. This indeed is not an Indictment for a formed Conspiracy, strictly speaking, which requires an infamous Judgment, and Loss of liberam legem, as upon Conviction on an Attaint, and for which an Indictment will not lie till Acquittal, or an Ignoramus found. But this seems to be a Conspiracy late loquendo, or a Confederacy to charge one falsely, which, sure, without more, is a Crime; and it is a Crime for several People to join and agree together to prosecute a Man right or wrong.

2 Cro. 131.
acc.

Vide 2 Cro. 8.

2 Cro. 131,
contra.

If in an Indictment for such Confederacy you proceed further, and shew a legal Prosecution of the Confederacy, there you must shew the Event thereof, as Ignoramus returned on the Indictment, or an Acquittal, or else the Indictment fails; but where you rest upon the Confederacy, it will be well without more.

And it seemed to the whole Court, that the very Agreeing together to charge a Man with a Crime falsely, is a consummate Offence, and indictable: And as to the Want of averring his Innocence, every

Vide ante 100,
137, 169.

ry Man is presumed innocent till the Contrary appears, and the Falso strongly implies his Innocence.

Indeed if the Truth had been, that there was a Woman with Child, and the Parish likely to become chargeable, and the Defendants being Parish-Officers had met to inquire and find out the Father to save the Parish harmless, and upon such an Occasion should, upon their Information, charge this P. P. to be the Father, and the Indictment had been for that, they must have been acquitted.

And tho' all the Court were clear for the Queen, yet at the Importunity of Broderick, they let it pass over till the next Term.

And in Trinity Term after, Jud. pro Regina. For it is a Conspiracy to charge one falsely with Fornication, which tho' it be no Crime at Common Law, yet is punishable in the Spiritual Court; and a Confederacy falsely to charge with a Thing that is a Crime by any Law is indictable, and the Confederacy is the Gift of the Indictment. Per totam Cur'.

Per Holt, Ch. J. If an Attorney will take a Man's Money to do Business, and does not do it, we may enter into a summary Examination of it, and if we find him refractory, we may strike him out of the Roll. Qr. 2 Lev. 66.

Domina Regina versus Wheeler.

Inquisition before the Coroner, super Visum Corporis, That the Wheel of a Forge moved to the Death of the Deceased. And now it was moved to stay Process for seizing it as a Deodand, because Parcel of a Freehold, as the Wheels of a Mill or Mill-stone, which were agreed to be Freehold, and ideo not capable of being a Deodand.

And per Holt, Ch. J. A Mill is a known Thing in Law, and so are the Parts thereof; and therefore if the Owner of a Mill take out one of the Mill-stones to pick or gravel it, and devise the Mill while the Stone is severed from it, yet it shall pass as Part of the Mill: And a Bell cannot be a Deodand.

Et per omnes. Let Process upon the Inquisition stay.

Britton *versus* Standish.

1 Salk. 166.

S. C.

Vide 3 Mod.

42, 43.

Libel for not

coming to his

Parish-Church

on Sunday and

not receiving

the Sacrament.

Motion for a

Prohibition,

for that he

went to ano-

ther Church,

&c.

LIBEL was against him in the Spiritual Court, for not coming to his Parish-Church on Sunday, and not receiving the Sacrament at Easter.

Parker moved for a Prohibition upon a Suggestion, that the Determination of the Bounds of Parishes, and the Interpretation of the Laws and Statutes of the Realm, belonged to the Queen's Temporal Courts, and that by them no Man is bound to go to his Parish-Church, so he go to some Church, and that the Defendant did constantly resort to another Church. And Day being given by the Court for the hearing Counsel of both Sides, Raymond against the Prohibition.

1. The Suggestion does not say, that he resorted to any Church in which there were Divine Prayers.

R. He is bound by old received Canons to go to his Parish-Church, &c.

2. By the old received Canons, every Parishioner is bound to repair to his Parish-Church on Sundays and Holidays, and it is no Excuse that he went to another Church without it be upon an extraordinary Occasion, and for a reasonable Cause which ought to come of his Side, and of which the Spiritual Court are Judges. Vide Linw. 184. de Paroch. and his Comment upon the Word Volentibus in the Canon, which implies a Liberty to Parishioners of not coming to the Parish-Church on other Days than Sundays and Holidays, which are Days of Obligation; and herewith agreeth Selden, — Vid. Sparrow's Collection 78. & Injunction 46. whereby it is directed, that some discreet Persons of the Parish be appointed to see that Parishioners do repair to their Parish-Church, and to present such as do fail, in order to a Compulsion by Ecclesiastical Censures: Vid. the 90th Canon of the Constitutions of 1603. idem, and the Statute of 1 Eliz. 2. c. sect. 14. express in the Point, and the Act of Toleration, 1^o W. & M. makes Alteration only in Favour of Protestant Dissenters, and therefore cannot avail the Defendant here, he having not shewed himself one as he ought if he would take Advantage of it.

Especially on Sundays and Holidays.

And 1 W. & M. cannot avail the Defendant.

As to Parishes at first, and Maintenance of the Priests.

Then as to the Reason of the Thing itself, it seems clear for us; for Parishes at first were Districts, certain Parts of the Diocese, and the Care of the Souls of the Inhabitants were charged upon certain Priests, who were maintained by the Diocesan by a Distribution of the Offerings made at Christmas; and by the ancient Canons, as well as by Acts of Parliament, such Priests having Care of Souls, were bound to a Residence upon their Parishes, the better to discharge that great Duty, which End they could not well answer, or minister fit Remedies to the Spiritual Diseases of their Parishioners, if the Parishioners might chuse whether they heard their Instructions or not.

And

And as to the other Charge in the Libel, viz. the not receiving the Sacrament at Easter, vid. Linw. 8. 143. that all Christians ought to receive the Sacrament at least once a Year, viz. at Easter, ibid. 227. And so is the Rubrick established by Parliament, and the twelfth Canon of the Constitutions of the Year 1603.

As to receiving the Sacrament.

Parker contra. As to the Statute of the 1st of the Queen, though the Words be, That every Parishioner should repair to his Parish Church, yet the true Meaning of it is well expounded by other subsequent Statutes, where that Clause of it is taken Notice of, and recited according to the Meaning and Substance thereof, viz. that every Man should go to his own Parish, or some other Church, &c. Vide 3 Jac. 1. c. 4. sect. 27. Cawleigh's Law of Recusants, — the late Act of Toleration, 1 W. & M. Spelm. Consil. 1 Part 193. 2d Part 141.

Exposition of Stat. 1 El. to his own Parish Church, or some other. 3 Mod. 43.

Vide 1 Lev. 5. 167. 2 Cro. 480. 1 And. 138.

Holt, Ch. J. seemed to doubt whether a Parishioner were compellable by Ecclesiastical Censures, to repair to their Parishes on Sundays; for at that Rate, the Gentlemen of Gray's Inn, Lincoln's Inn, &c. who have a Chapel of their own, in which they have constant Prayers, would be compellable to go to their respective Parishes, a Thing which was never thought they were obliged to: And he thought Parishes were instituted for the Conveniency of the Parishioners, that they might have a Place certain to repair to when they thought convenient; and a Parson, from whom they had Right to receive Instructions, and other Church-Rites: Yet he agreed, that it was not commendable for a Parishioner to absent himself humorously from his Parish. One is indeed bound to receive the Sacrament three Times a Year; but that Easter was only named for Direction, but not for Compulsion, and seemed to be mentioned for the Sake of the Offerings then.

If Parishioners are compellable by Ecclesiastical Censures to repair to their Parishes on Sundays, because of the Inns of Court, Chapels, &c.

Powell totis viribus contra. The Truth is, we live in an Age where Men are apt to bring those Things in Question, of which our Ancestors never doubted; and it is not fair to inquire so narrowly into the Original of the Jurisdiction of the Ecclesiastical Court on all Occasions, and it is plain they are in Possession of this Jurisdiction, and frequently exercised it; and if we will ask, how they come to have Cognizance of Testamentary Matters, we shall find no other Right they have to it, but constant and uninterrupted Usage, and as to the Instance of Gray's Inn, and such like, there will be Usage against Usage, and the Repairing to such a Chapel will be a reasonable Excuse, and ought to be pleaded; and for a full Authority in the Point, he relied on Brown's Case, 2 Roll, Rep. 455. where a Prohibition was denied, the Question there being on the Reasonableness of the Excuse pleaded: Of which the Court said, The Spiritual Court was the proper Judge; and the Reason of the Parishioners Obligation to come to Church, is not for the Sake of any Offering or Profit to the Parson, but in Regard that he has the Care of their Souls, which he could not discharge if they came not to hear him.

R. That the Ecclesiastical Court have such Jurisdiction.

Britton *versus* Standish.

1 Salk. 166.

S. C.

Vide 3 Mod.

42, 43

Libel for not coming to his Parish Church on Sunday and not receiving the Sacrament.

Motion for a Prohibition, for that he went to another Church, &c.

LIBEL was against him in the Spiritual Court, for not coming to his Parish Church on Sunday, and not receiving the Sacrament at Easter.

Parker moved for a Prohibition upon a Suggestion, that the Determination of the Bounds of Parishes, and the Interpretation of the Laws and Statutes of the Realm, belonged to the Queen's Temporal Courts, and that by them no Man is bound to go to his Parish Church, so he go to some Church, and that the Defendant did constantly resort to another Church. And Day being given by the Court for the hearing Counsel of both Sides, Raymond against the Prohibition.

1. The Suggestion does not say, that he resorted to any Church in which there were Divine Prayers.

R. He is bound by old received Canons to go to his Parish Church, &c.

Especially on Sundays and Holidays.

2. By the old received Canons, every Parishioner is bound to repair to his Parish Church on Sundays and Holidays, and it is no Excuse that he went to another Church without it be upon an extraordinary Occasion, and for a reasonable Cause which ought to come of his Side, and of which the Spiritual Court are Judges. Vide Linw. 184. de Paroch. and his Comment upon the Word Volentibus in the Canon, which implies a Liberty to Parishioners of not coming to the Parish Church on other Days than Sundays and Holidays, which are Days of Obligation; and herewith agreeth Selden, — Vid. Sparrow's Collection 78. & Injunction 46. whereby it is directed, that some discreet Persons of the Parish be appointed to see that Parishioners do repair to their Parish Church, and to present such as do fail, in order to a Compulsion by Ecclesiastical Censures: Vid. the 90th Canon of the Constitutions of 1603. idem, and the Statute of 1 Eliz. 2. c. sect. 14. express in the Point, and the Act of Toleration, 1^o W. & M. makes Alteration only in favour of Protestant Dissenters, and therefore cannot avail the Defendant here, he having not shewed himself one as he ought if he would take Advantage of it.

And 1 W. & M. cannot avail the Defendant.

As to Parishes at first, and Maintenance of the Priests.

Then as to the Reason of the Thing itself, it seems clear for us; for Parishes at first were Districts, certain Parts of the Diocese, and the Care of the Souls of the Inhabitants were charged upon certain Priests, who were maintained by the Diocesan by a Distribution of the Offerings made at Christmas; and by the ancient Canons, as well as by Acts of Parliament, such Priests having Care of Souls, were bound to a Residence upon their Parishes, the better to discharge that great Duty, which End they could not well answer, or minister fit Remedies to the Spiritual Diseases of their Parishioners, if the Parishioners might chuse whether they heard their Instructions or not.

And

And as to the other Charge in the Libel, viz. the not receiving the Sacrament at Easter, vid. Linw. 8. 143. that all Christians ought to receive the Sacrament at least once a Year, viz. at Easter, ibid. 227. And so is the Rubrick established by Parliament, and the twelfth Canon of the Constitutions of the Year 1603.

As to receiving the Sacrament.

Parker contra. As to the Statute of the 1st of the Queen, though the Words be, That every Parishioner should repair to his Parish Church, yet the true Meaning of it is well expounded by other subsequent Statutes, where that Clause of it is taken Notice of, and recited according to the Meaning and Substance thereof, viz. that every Man should go to his own Parish, or some other Church, &c. Vide 3 Jac. 1. c. 4. sect. 27. Cawleigh's Law of Recusants, — the late Act of Toleration, 1 W. & M. Spelm. Confil. 1 Part 193. 2d Part 141.

Exposition of Stat. 1 El. to his own Parish Church, or some other. 3 Mod. 43.

Vide 1 Lev. 5, 167. 2 Cro. 480. 1 And. 138.

Holt, Ch. J. seemed to doubt whether a Parishioner were compellable by Ecclesiastical Censures, to repair to their Parishes on Sundays; for at that Rate, the Gentlemen of Gray's Inn, Lincoln's Inn, &c. who have a Chapel of their own, in which they have constant Prayers, would be compellable to go to their respective Parishes, a Thing which was never thought they were obliged to: And he thought Parishes were instituted for the Conveniency of the Parishioners, that they might have a Place certain to repair to when they thought convenient; and a Parson, from whom they had Right to receive Instructions, and other Church-Rites: Yet he agreed, that it was not commendable for a Parishioner to absent himself humorously from his Parish. One is indeed bound to receive the Sacrament three Times a Year; but that Easter was only named for Direction, but not for Compulsion, and seemed to be mentioned for the Sake of the Offerings then.

If Parishioners are compellable by Ecclesiastical Censures to repair to their Parishes on Sundays, because of the Inns of Court, Chapels, &c.

Powell totis viribus contra. The Truth is, we live in an Age where Men are apt to bring those Things in Question, of which our Ancestors never doubted; and it is not fair to inquire so narrowly into the Original of the Jurisdiction of the Ecclesiastical Court on all Occasions, and it is plain they are in Possession of this Jurisdiction, and frequently exercised it; and if we will ask, how they come to have Cognizance of Testamentary Matters, we shall find no other Right they have to it, but constant and uninterrupted Usage, and as to the Instance of Gray's Inn, and such like, there will be Usage against Usage, and the Repairing to such a Chapel will be a reasonable Excuse, and ought to be pleaded; and for a full Authority in the Point, he relied on Brown's Case, 2 Roll, Rep. 455. where a Prohibition was denied, the Question there being on the Reasonableness of the Excuse pleaded: Of which the Court said, The Spiritual Court was the proper Judge; and the Reason of the Parishioners Obligation to come to Church, is not for the Sake of any Offering or Profit to the Parson, but in Regard that he has the Care of their Souls, which he could not discharge if they came not to hear him.

R. That the Ecclesiastical Court have such Jurisdiction.

Gould accord. That they have original Jurisdiction, is most plain in both the Instances in the Libel; and quoted Hard. 406, 407, 503. full in Point.

That no Canon since 1603. can proprio Vigore bind Laymen.

Holt, Ch. J. A Jurisdiction allowed to them Time immemorial, must be taken to belong to them by Law; but what I doubt at present is, whether this be so: And if there be any ancient Canon for it, and received here before 1603. I will agree with you; but if not, no Canon since, tho' in full Convocation, can proprio Vigore bind Laymen: And it was proposed to them to stay below by Consent, and to declare in Prohibition forthwith, that the Matter might be judicially determined.

That if the Libel be grounded on 1 Eliz. they may compel them.

And at another Day, Montague moved for a Prohibition in the like Case; and then Holt, Ch. J. having viewed the Authorities, and the Act of 1 Eliz. Clearly, if the Libel be grounded upon the Statute of 1 Eliz. they may compel you to come to the Parish-Church; for that Statute does directly subject People to the Ecclesiastical Law in this Point; and the Case in Hardres and Rolle before-mentioned are direct in the Point, and we must not sit here to encourage Irreligion, to which People are too prone now a-days; and if one does go to a customary Chapel within the Parish, it will be good Excuse, but must be pleaded.

If a professed Church-man may go to Meetings, &c.

And per Holt, Ch. J. If a Man be a professed Church-man, and his Conscience will permit him sometimes to go to Meetings instead of coming to Church, the Act of Toleration shall not excuse him, for it was not made for such Sort of People: But no Rule was given, the Court saying, They would think of it before the End of the Term: And at last, a Prohibition was granted, and ordered to declare forthwith.

A Son is bound Apprentice to his Father, &c.

Per Cur', In a Case in which Mr. Broderick was of Counsel for the Parishes of — and Thursley in Surrey, upon an Order of Sessions concerning a poor Person; the Case was this: The Son was bound an Apprentice to his Father, and the Father gave up his Indenture to the Son, and bound him out to a Service into another Parish for a Year, where he served, but did not cancel the Indenture; and becoming poor, the Justices ordered him last legally settled in the Parish where the Father lived, because the Indenture being still in Force, his Apprenticeship continued; and tho' Broderick urged, and it was agreed, that an Accord with Satisfaction would be a good Discharge of this Covenant; and per him here is that which in its Nature tantamounts to a Satisfaction to the Father, for now he is discharged of the Obligation of providing for the Son as an Apprentice: Yet per Cur' The Indenture not being cancelled, the Obligation of the Apprentice continues; and if the Father should get the Indenture into his Hands again uncanceled, and sued the Son thereupon, the aforesaid Agreement would not be a good Plea for the Son; and

Per Cur', The first Obligation continues.

and it is a good Plea to a Covenant, or even to a Promise, that the Plaintiff agreed the Defendant should be discharged of it.

And Powell remembered the Case in the Book of H. 7. where one was bound by Bond, and the Obligee delivered it to the Obligor, who omitting to cancel it, Obligee having lit on it, put it in Suit; and all this was pleaded specially, and adjudged no Plea:—But upon another Exception, a Rule was to shew Cause why the Order should not be quashed.

Hodges versus Templer.

RULE was for Judgment in Hillary Term was Twelvemonth; but Costs being not taxed, Mr. Clarke, out of Kindness to the Defendant, gave Time for settling the Costs till Easter Term, and before Costs settled, and Judgment entered, the Plaintiff died: And now the last Hillary Term the Attorney entered up his Judgment as of Hillary Term before, viz. the Time that the Rule was pronounced. And now upon Motion, it was set aside for Irregularity; and they directed them if they pleased, to enter it as of Hillary last, being the Term that they really had entered it, and enter their Continuances till then, for the Court could not take Notice of the Plaintiff's Death.

Caf. temp. W. 3. 250, 493, 519. Caf. temp. Mac. 30, 325. 1 Mod. Caf. in L. & Eq. 189, 190, 310.

And per Holt, Ch. J. If one will enter a Judgment as of a Term, he must actually enter it before the Escoin-day of the succeeding Term, otherwise it shall only relate to the Term of which he enters it; and if Judgment be signed in Hillary Term, and in the subsequent Vacation the Defendant sells Lands, and before the Escoins of Easter Term the Plaintiff enters his Judgment, it shall affect the Lands in the Hands of the Purchaser; and if one enters Judgment so in Vacation, when indeed the Party was dead, if he was living in the Precedent Term, the Judgment is good by Relation.

Domina Regina versus Inhabit' de Com' Wilts. Post 307. 1 Salk. 359.

THEY were informed against, for not repairing a common Bridge in their County: And now the Attorney General moved for a Ven' fac' to the County of Berks, the whole County of W. being concerned.

And per Cur', The Attorney may choose which of the adjacent Counties he pleases, and he may have the Ven' fac' from the Body of that County, or de Vicineto of such a particular Place therein next adjacent to Wiltshire; and the Defendant is not intitled to an Impar lance upon Amendment of an Information.

Per Cur', An Under-Sheriff ought not to serve as an Attorney during his Sherivalty.

Domina

Vide antea 59.
Judgment of a
precedent Hil.
Term, and
Plaintiff died
before Costs
settled; and
next Hil. Term
Judgment be-
ing entered as
of the first Hil.
Term, was set
aside.
Id. Raym.
695, 869, 850;

Ante 14, 184.
1 Salk. 401.
Vid. post 241.
1 Mod. 1.

Vid. ante 150.
Post 255, 307.
Information
for not repair-
ing a common
Bridge.
1 Vent. 61.
See 1 Hawk,
ch. 77.
Caf. temp. W.
3. 372, 442,
503, 568.
Stra. 911, 874.

Attornies.

2 Salk. 680,

681. S. C.

Ld. Raym.

1199, 1265.

S. C.

Clerk of the

Peace convict-

ed of Mide-

meanors.

2 Carth. 426.

Domina Regina *versus* Baines.

HE was convicted before the Justices of Peace at their Quarter-Sessions, upon certain Articles of Misdemeanors in his Office of Clerk of the Peace for the County of W. (pursuant to the Authority given to the Justices by the late Act of Parliament) exhibited against him: And the Order being removed up by Certiorari, Mr. Wells took several Exceptions to it.

Obj. To the

Articles, &c.

being only for

taking exces-

sive Fees.

Ld. Raym.

159, 163, 166.

Caf. temp. W.

3. 13, 42, 199.

Caf. temp. An. 80, 81, 82, 137.

Stra. 996.

Sed per Cur',

That is a nice

Distinction

between taking

Fees, and

executing an

Office; and

sure taking of

Fees colore

Officii, is an

Act in

Execution of

an Office; and

an Office and

Profits are as

much the same,

as the Lands

and Profits of

them are one

Thing.

Obj. That Ar-

ticles were re-

ceived by ele-

ven, and the

Conviction on-

ly before six.

Non allocatur.

2. The Words of the

Statute are, That the

Justices of Peace may

at their Sessions receive

Articles against him; which

said Justices may, if they

see Occasion, convict him;

and here it appears, the Ar-

ticles were received by such

and such, Eleven in all, by

their Names, at such a

Sessions, and the Matter

adjourned to another

Sessions; and there before

Six of the aforesaid Eleven

Justices & al', he was

convicted; so the Words

not pursued: Sed non

allocatur; for the

Meaning of the Statute

is not, that the same

individual Persons who

received the Complaint,

should amove; but it is

enough they be virtually

the same, viz. the same

Court; and though not

one of those who received

it were at the next

Sessions held by

Adjournment, it would

be notwithstanding well.

Obj. It does

not appear that

he was Clerk at

the Time of

the supposed

Extortion.

3. It does not appear

that he was a Clerk

of the Peace at the

Time of the supposed

Extortion committed;

but it is only said,

that he claimed and

exercised the said

Office, and that might

be, and he have no

Right to it, or that

he executed it as a

Deputy: And this

seemed a good

Exception; for if

he were in by

Wrong, or as

Deputy to another,

and committed

Causes of Forfeitures,

and after gets in

by Title, or as

Principal, he should

not by Reason of

those precedent

Misdemeanors

lose his Office.

Obj. That the

Articles were

not direct and

certain, but

only more than

his just Fees,

&c.

4. In the Articles

which were the

Foundation of the

Proceedings, and

ought to be direct

and certain, one

Fact charged was,

That he did extort

and force such a

Person to pay him

2 s. 6 d. for a

Subpoena for a

Witness to appear

at the Quarter-

Sessions, which

was more than

his just Fees; without

shewing what the

just Fees were, or

laying it to have

been colore Officii,

or what Quarter-

Sessions the

Witness was

subpoena'd to;

for it might be

the Quarter-

Sessions of York,

Cornwall, &c.

and therefore

not Matter in

Execution of

his Office.

5. Another

5. Another Sum articulated against him for, was said to be for Matter done at the Quarter-Sessions of his County, but not said to be colore Officii. *Obj.* Not said to be colore Officii.

And per Holt, Ch. J. and Powel, clearly: These Articles being a Charge against the Defendant to bring him under Forfeiture of his Office, in which now by the late Act of Parliament he has a Freehold, ought to be as direct and certain as an Indictment; but as to the Want of ascertaining what the just Fees were, it is said to be more than the just Fees. That these Articles which touch his Freehold, ought to be as direct and certain as an Indictment. 1 Vent. 19,

And per Powel, That is enough, for the Justices are Judges of that where the Fees are not ascertained by Act of Parliament: And Per them two; We can't intend any Thing where a Man's Freehold is to be forfeited; and it does not appear that the first Sum was taken for any Thing under his Management as Clerk of the Peace, and the Conviction must be according to the Articles, and not exceed the Extent of them. And it being spoke to again, the said two Justices were clear of the same Opinion, for this Charge would be bad in an Indictment for Extortion in his Office; and this summary Way is severe enough, without having it more loose than an Indictment, which would only subject him to a Fine; whereas this is in order to a Forfeiture of his Freehold: And if this were an Indictment, the Extortion must have been laid colore Officii; and it is not enough, that the Title of the Articles is, That it was for Misdemeanors in his Office; but the Instances ought to be alledged so too, and the Recital in the Order that it was colore Officii, is only a false Inference of the Justices not warranted by the Articles, which are the Foundation; and he can't be convicted of any Thing but what he is charged with in Writing; and he is charged with nothing directly in Execution of his Office. 20. Carth. 226. And here the Court will not intend any Thing, &c.

Gould & Powys dubitantibus, Whether this need be as certain as an Indictment, for then without doubt it would be bad; and because they were not satisfied, though the other two were very clear, (ut supra) it went over till the next Term.

And here per Holt, Ch. Just. If the Clerk of the Peace had committed a Misdemeanor, and to prevent a Forfeiture had surrendered his Office to the Custos Rotulorum, and taken a new Grant, that should not purge the Forfeiture, for then it would be in the Power of him and the Clerk to frustrate the Intent of the Statute; and after Conviction of the Clerk of the Peace for a Misdemeanor in his Office, the Custos Rotulorum is to nominate another Person in convenient Time, and cannot name the same Person again; but if an Officer commit a Forfeiture, and he that is to take Advantage of it accepts a Surrender, and makes him a new Grant, the Forfeiture is purged; it is Extortion in Officer to take Fees when none is due, or more than is due, or before they are due: And though the Order be quashed, yet he may be prosecuted again, as if Attainder of Felony be reversed, the Party must be tried again. Here, upon a Misdemeanor, a Surrender to the Cust' Rot', and a new Grant would not avail.

D d d

And

But the Articles are no direct Charge.

And at another Day, in Michaelmas Term, Powys came over to the Opinion of the Ch. Just. and Powell, That the Articles were no direct Charge: But Gould persisted that this being in case of a Freehold, and by consequence the Charge to forfeit ought to be certain: Yet it was a Freehold created by Act of Parliament; which Act subjects it to a Forfeiture for Misdemeanors, and directs the Charge and Examination thereof in this summary Way and Manner, which he thought would not require so great Strictness as in case of an Indictment; and the Case of Dyer 114. was quoted, where a Filazer was removed by the Court by Parol.

And the Court being for quashing it, Attorney General moved to quash the Certiorari.

But per Cur', Not like this, for that Amoval is not peremptory, but the Cause may after come in Question upon an Amise; but this Amoval is made final by the Statute: So the Court being clear for quashing it, the Attorney General moved to quash the Certiorari; de quo vide postea 206, 208.

2 Salk. 651.
S. C.

Wey versus Yally.

Debt brought in London upon a Demise of Lands in Jamaica, &c. Post 228.
1 Lev. 143.
Ld. Raym. 1212, 1214.

DEBT for Rent upon a Demise of Lands in Jamaica, brought in London, and Plea to Jurisdiction of this Court, That there are Courts of Record there, in which all Actions concerning Lands there are determinable, and prays Judgment, if this Court has Jurisdiction: And on Demurrer, Broderick, in Maintenance of the Plea, quoted the Case of Parker and Damer in this Court, Hill. 1 & 2 W. & M. Rot. 505. that Debt does not lie here for Rent, against Assignee of a Term in Ireland; and in the principal Case, if the Defendant had a good local Plea, as an Entry and Duffer made by Lessor, such a Plea would want Trial here, and quoted for this, 3 Keb. 150. where Debt was brought for Rent upon Demise of Lands in Ireland; and pleaded that the Duke of York was seised in Fee of the Lands, and enter'd, and ousted the Lessee, and Issue there upon the Entry and Duffer.

The Case and Disadvantage of the Defendant.

And per Hale, It is bad, because the Issue could not be tried here: And he said, In the principal Case his Client was at that Disadvantage; for the House demised, was casually burnt, and by an Act of the State of that Country order'd never to be rebuilt, and a Reparation made to the Lessor; and we cannot have Benefit of this Matter in Evidence here, because the Jury cannot inquire of it; and the Plaintiff is at no Mischief, for if he has not Justice there, he may have a Writ of Error hither.

Vide 1 Saund. 238.
Hob. 37.
1 Cro. 143, 183, acc.
7 Co. 2.
1 Jo. 43, 44.
Vide 1 Vent. 59.

Holt, Ch. Just. Your Case of Parker and Damer is good Law; for being brought against the Assignee, it is grounded upon the Privy of Estate, which is local, and therefore to be brought where the Land lies; but if it had been by Lessor against the Lessee, or by Assignee of Reversion, Debt or Covenant upon the Statute 32 H. 8. c. 34. it were otherwise, for then it might be upon the Privy of Contract, which

which is transitory, and therefore might be laid any where: If a Deed bear Date at a Place certain, the Action thereupon must be laid there: And it has been held, that if a local Issue arise in Ireland, in an Action laid here in England, it shall be either tried in the County where the Action is laid, according to Dowdale's Case in 6 Co. 46, 47, 48. or by suggesting that such a Place in such a County is next to Ireland, and have Jury from thence. And here the Defendant, upon Nil debet, may give Entry, &c. or the Law of the Country in Evidence, if there be such a Law; and this we see every Day done before Committees of Appeals from thence.

Powell. The Diversity appears plain between local and transitory Actions. If a Deed bear Date out of the Kingdom, if the Place of the Date be not alledged somewhere in England, we cannot try it; but here the Action is grounded upon the Contract, which follows the Person wherever he goes. And if the Defendant had pleaded a local Plea, it might be tried where the Action is brought, or by Suggestion, as my Lord says, in the next Place, whereof we have Precedents in Cases from Ireland. And there may be a Law in Jamaica against Bonds; yet sure that will not confine the Action of Debt upon Bonds made there to that Country. And an Action of False Imprisonment has been brought here against a Governor of Jamaica for an Imprisonment there, and the Laws of the Country given in Evidence.

Vide Hob.
233.
2 Cro. 76.
1 Inst. 261. b.

Et per tot. Cur. Respond' ult'.

Winter *versus* Garlick.

DEBT upon Bond for Performance of an Award, and Award was, That Defendant should pay the Plaintiff 10 l. and the Costs of a certain Suit before depending in an inferior Court, and thereupon mutual Releases; and Exception was, that the Award was not certain nor final, no Body knowing what the Costs were; and then it was not mutual, the Releases being ordered upon Payment of the 10 l. and the Costs. Vide 2 Lev. Fintney *versus* Bullock. 3 Lev. 413.

Award to pay
Costs of Suit
depending in
inferior Court,
&c.
Vide 1 Salk.
74, 75.

To which was answered Cro. Car. 383. where it is said, that the Costs may be ascertained by the Attorney's Bill. 2 Vent. 242, 243.

Holt, Ch. J. It has been held a good Award to pay such Costs as Prothonotary should tax, and that carries it far enough; but sure they shall either ascertain it themselves, or refer to a proper Officer.

1 Salk. 75.

Powell. That Case referring to the Officer of a Court has been settled on Debate, for id certum est quod certum reddi potest. Et adjournat'.

Per Holt, Ch. J. There can be no such Thing as a Demurrer in Abatement. Vid. 1 Salk. 93, 94, 218, 220. Show. 91.

Vide post
198.

Harvey

S. C. cited
Ld. Raym.
1066.
2 Salk. 626.
S. C.
Vide post
251, 252.
Ante 148,
159.
If the Court
can take No-
tice of the
Mistake of a
Day, being
told of it *Ore
tenus*, &c.
Ld. Raym.
4, 281,
870, 1557.
Caf. temp.
W. 3. 647,
667.

Harvey *versus* Broad. Vid. antea 148, 159. S. C.

IT was now the Question, Whether the Court ought to take Notice of the Mistake of the Day, by being told of it *Ore tenus*, and not assign'd for Error on the Record?

And Pengelly urged, That there was no Reason they should; for the Court in their Judicial Proceedings, never reckon by the Days of the Month, but by the Days of the Week, as *Die Lunæ prox' post* such a Return, and relied on 1 Cro. 53. where a Writ of Inquiry was returnable *Die Lunæ prox' post* Quinden' Hill. 1 Car. and the Sheriff returned an Inquisition before him the 27th of January, a Day in Truth after the Writ was returnable, and yet the Court refused to take Notice of it, being not assigned on the Record. Vide 1 Lev. 196. a Precedent where it was assigned on the Record, 1 Sid. 301. the Case in Croke allowed to be Law. Plowd. 265. a. 266. b. Rol. Abr. 524. pl. 5. Dyer 181. pl. 52. 21 H. 6. 13. pl. 4. 3 Cro. 227. Latch 118. Sir Tho. Jones 228.

Contra, Broderick quoted 2 Cro. 506, 548.

Holt, Ch. J. You cannot say that the Monday is *Tres Trin'*, for in Truth it is the Sunday; but because the *Essoins* cannot be kept on the Sunday, they are kept on the Monday, and yet the Sunday is one of the Four Days.

A Calculation
moveable for
Easter for
ever.

Vid. ante 41,
81, 160.
1 Leon. 142.
Post 252.
2 Keb. 59.
Vid. 1 Jo.
301. contra.

Note.

At the Council of Nice, they made a Calculation moveable for *Easter* for ever, and that is received here in England, and become Part of the Law, and so is the Calendar established by Act of Parliament. Vide the Statute de Anno Bissextili. And can we take Notice of a Feast, without telling what Day of the Month it is? Or shall we take Notice of it because you shew it on the Record, and not when we see it as plainly without your telling? Vide Gage's Case, in 5 Co. 45. In the Entries, the Teste of the Writ of Covenant was after its Return, and this did not otherwise appear to the Court, but by their own taking Notice of it; and contrary to Coke's Report of it, it was not amended, but Judgment reversed.

Et adjournat'.

Vide 2 Ld.
Raym. 1066.

Ante 148,
159.

And it being again moved in Michaelmas Term, they were all clear that they must judicially take Notice that *Tres Trin'* was on a Sunday, and that Gage's Case in Co. Entries 250. Mo. 571. is full in the Point, contrary to Rep. in 5 Co. and so is Fish and Bocket's Case in Plowd. where a Fine was reversed because one of the Proclamations was on a Sunday.

Fanshaw *versus* Morrifon. Vid. antea 157, 159.

1 Salk. 208.
2 Salk. 520.
Ld. Raym.
1138. S. C.
Sci. fa. upon
a Recogni-
zance that
they and ei-
ther of them
recognovit.
Caf. temp.
Mac. 306.

SCI fa. upon a Recognizance by Bail, setting forth, That they and either of them recognovit to owe the Sum of 40l. to be raised of the Goods and Chattels, Lands and Tenements, of them and either of them, upon Condition, &c. And the Sci. fa. was to shew Cause why the said Sum of 40l. should not be raised of the Lands, &c. of them and of either of them, with an Averment, Quas quidem separales Summas of 40l. they or either of them did not pay.

And Wells insisted, that the Sci. fa. was bad, for to levy 40l. of the Goods and Lands of them and either of them, was to levy two several Sums of 40l. and that ought not to be; and relied on the Case of Parry and Villars, where Judgment was to recover separales Summas, the Recognizance being as here, and Judgment reversed.

And he said, that it was impossible for two to be jointly and severally indebted in one individual Sum, though they may be jointly indebted, and bind themselves jointly and severally to the Payment; and therefore the common Form of Bonds by two are, Noverint Universi, &c. nos teneri, so making a joint Lien for the Debt, which, as to the Obligation of Payment, is distributed and made several by the ad quam quidem Soluc' obligamus nos & utrumque nostrum, &c.

Holt, Ch. Just. remember'd and agreed the Case of Parry and Villars, but said, that by the Words here one Sum was only payable, but leviable upon the Goods and Lands of them both, or of either of them, at the Party's Election.

And he said, there was this Difference between a Bond jointly and severally, and a Recognizance so; that upon the Bond you cannot sue both jointly and severally, but upon a Recognizance you may.

Et adjournat'. Vide Hill. 3 Annæ, the Resolution.

Elmore *versus* Tucker.

In Replevin
Conuzance
as a Distress
for Rent.
Bar, that they
escap'd into
Defendant's
Ground for
Want of his
Repairs, and
there distrain-
ed, &c.

Vide Hob.

265.

2 Saund. 282,

289.

Carth. 122,

179, 186.

IN Replevin, Conuzance was as Bailiff to J. S. for Rent upon a Demise by the said J. S. of the Locus in quo. Bar, that J. S. whose Fee it was, Time out of Mind used, and ought, to repair and maintain the Fences between the Place where and the Plaintiff's Land next adjoining, and thro' Want of Repair the Plaintiff's Cattle escaped into the Place where, and were distrained for the Rent; and on Demurrer, Eyre for the Demurrer relied on 2 Saund. Pool *versus* Longville, the very Case.

Holt, Ch. J. I think it is hard to maintain that Judgment, that when the Plaintiff's Inheritance is charged with the Repairs, he should take Advantage of his own Wrong in not repairing, by making the escaping Cattle a Distress for his Rent; and it is not like the Case of Lord and Tenant there quoted, for the Lord has nothing to do with the Land, but the Charge of Repairs belongs to the Tenant.

Per Cur'. That Judgment is fit to be re-considered.

Adjournat'.

Ideo adjournatur.

1 Salk. 220.
S. C.

Docmanny *versus* Davenant.

Demurrer in
Abatement.

Joinder in
Bar.

Ld. Raym.

20, 22, 393,

1021, 1023,

1056, 1483.

Cal. temp.

Mac. 169,

170.

Ex Officio, Skin. 620. Carthew 88.

THE Defendant demurred in Abatement, and Plaintiff joined in Bar, and Judgment final for the Plaintiff: For the Court said, they knew not what a Demurrer in Abatement was, for if the Cause be apparent to the Court, they would abate the Writ, &c. themselves, or else it ought to be pleaded, and they said they would turn all such Demurrers into Bars, tho' Eyre quoted Wimbish *versus* Willoughby in Plowd. a Precedent of a Demurrer in Abatement. Vide antea 84, 88, 115, 195. of Demurrers to Pleas in Abatement, but not of Demurrers in Abatement.

1 Salk. 7. S. C.

Lepiot *versus* Browne.

One B. removed into Cust' Mar', pleaded in Abatement for Want of distinguishing him from his Father.
Comyns 260.

BEING removed by Habeas Corpus into Custod' Mareschalli, the Plaintiff declared against him by the Name of J. B. of such a Place, in Custodia Mareschalli; and he pleaded in Abatement, that his Father lived in the same Town, and that his Name was J. B. too, and concluded in Abatement, for the Want of the Addition of Junior, or some other, to distinguish him from the Father; and tho' this was by Bill, and so not within the Statute of Additions, yet by the Common Law there ought to be an Addition to distinguish in this Case of the Son; secus if the Father were sued, for then J. B. without Addition

Addition will be taken for the Father; and the being in Custod' Marefc' shall not help it:

1. Because there is no Description of the Person.
2. The Father may be there too. And he quoted Rast. Ent. 310.
33 H. 6. 54, 55. 37 H. 6. 29. b. 30. a. 4 Ed. 3. 31. 8 Ed. 3. 50.
21 H. 6. 26. b. 5 Ed. 4. 25. a.

Holt, Ch. Just. Suppose Father and Son be called J. S. and one by Will devises his Lands to J. S. this prima Facie shall be understood the Father; but if it be made out, that Devisor did not know the Father, &c. the Son shall take, quod fuit concess'. And suppose one deals with the Son, and knows nothing of the Father, shall he at his Peril take Notice that he has a Father of the same Name, &c? Indeed, the Defendant, by bringing the Habeas Corpus, had concluded himself if you had relied upon it. If this were an Original, and the Father and Son had lived in different Counties, there had been no Occasion of Addition of Junior.

Where upon
a Devise the
Father shall
be intended
prima Facie.
Ld. Raym.
304.

Vide 11 Co.
89.
1 Keb. 182.

And per Cur', You should have also said, That the Father was in Custod' Marefc' too: And therefore respond' ult' Nisi before End of Term; but the last Day Pengelly speaking to it again, let it go over.

Let it go
over.

Adams *versus* Tertenants of Savage. Vid. antea 134.
Post 226.

1 Salk. 40.
S. C.
Ld. Raym.
854, 1253.
S. C.
2 Salk. 601,
679.
Plea in Abate-
ment of Sci'
fac' that J. S.
was a Ter-
tenant not
summoned.
Carth. 111.
Skinner 273.
Caf. temp.
W. 3. 407,
499.
Difference
where the
Writ is ge-
neral.

Sci' fac' was to summon in the Tertenants of S. not naming them: And to this it was pleaded in Abatement, That J. S. was a Tertenant not summoned, and concluded quod Breve cassetur; whereas the true Way had been to conclude, Si respondere debeat quousque, and thereupon to take a new Writ to summon in that Tertenant: But for Precedents of such Conclusions as here, Co. Ent. 604. Cliff's Entries 702. Vid. 2 Cro. 506, 507. Cro. El. 740. Mo. 524. contra. All the Court took a Difference where the Writ is general, and where it goes about to name the Tertenants particularly, and omits one: In the latter Case, the Writ may be abated, for there the Party may have a better Writ of the Kind, viz. One naming them all; but in the first Case he cannot, and therefore we cannot give Judgment to quash the Writ, but only he shall not be put to answer till the other be summoned.

But because Darnell, Serjeant, urged he had a Multitude of Precedents contrary, they gave Way to shew them. Vide 1 Keb. 55, 310, 351, 352.

1 Keb. 351. Tertenants cannot plead in Abatement if any be summoned.

Conclusion of a Plea in Abatement. See Carthew 363, 364. Inst. Leg. 512, 513, 523, 524.

Harwood

Harwood *versus* Turberville.

Bond to pay
on all De-
mands, if his
Mother would
not pay.
Vide 1 Lev.
3, 45, 77.
Raym. 27.
1 Sid. 105,
456.
1 Mod. 35.
2 Mod. 285.
2 Saund. 66,
78.

Request
where ne-
cessary.
Vide post
260, 227.
2 Salk. 457.
Carth. 268.
Ld. Raym. 596, 1095, 1140. Cas. temp. W. 3. 413, 414. Cas. temp. Mac. 519, 520.

Defendant borrowed Money for the Use of his Mother, and obliged himself by Bond to the Payment of it, on all Demands, if his Mother would not pay: And now in Debt upon this Bond, and Oyer thereof, he demurr'd to the Declaration, because there was no special Request with Time and Place of the Mother, and licet sapius requisitus would not do; for, as it was said, the Defendant ow'd nothing till Want of Payment by the Mother, and no Fault could be in her, there being no Demand.

Per Cur', When there is a Duty which the Law makes payable on Demand, there needs no Demand expressly laid; but where there is no Duty till Demand, it is otherwise; and here was a Duty ab initio: If a Man be bound to pay Money on Default of Payment by another, but is not the original Debtor, there he is not chargeable till special Request made of him who was to pay it.

Jud' pro quer'.

Walsmely *versus* Ruffel.

Case for scan-
dalous Words
spoken of a
Justice of
Peace, and
Chancellor of
a Consistory
Court, &c.
Verdict and
Damages for
Plaintiff.
Vide 3 Co.
191.
1 Lev. 535,
280.
3 Lev. 50.
Farell. 107,
108, &c.
Carth. 330.
Skinner 98,
112.
Ld. Raym.
236, 710,
812, 1369.
Cas. temp.
W. 3. 98, 514. Cas. temp. An. 193, 194, 220, 221. Cas. temp. Mac. 196, 197, 198. 1 Mod. Cas. in L.
& Eq. 270. Comyns 262. Stra. 420, 617, 1157, 1168.

Plaintiff in the Case declared, That he is a Man of Reputation, free from all Perjury and Subornation of Perjury; and that he is, and for six Months before the Words spoke was, a Justice of Peace, and is, and for several Years before was, Chancellor of the Consistory Court of the Bishop of Coventry and Litchfield; and Writs did issue such a Year for calling a Parliament, and that such a Day in that Year was appointed for the Election of Burgesses for Litchfield to serve in the said Parliament; that the Plaintiff intended to stand as Candidate, and of such his Intention gave publick Notice; that the Defendant knowing the Premises, to disparage the Plaintiff in his Credit and Reputation, and to bring him under the Penalty of Perjury, and Subornation of Perjury, at such a Time and Place, in hearing of several of the Queen's Subjects, and in the Presence of the Plaintiff, spoke of him the Plaintiff these false and scandalous Words; There goes your rare Chancellor, innuendo the Plaintiff, to suborn Witnesses to swear against the Parson; Whereas the Plaintiff was not guilty thereof. Verdict and Damages for the Plaintiff.

That the
Words are
actionable,
being spoken
in Reference
to his Office
of Chancellor,
&c.

Gould, Just. The Action well lies: If the Words were simply and abstractedly spoken, without Reference to any publick Employment or Office of the Plaintiff, the Case would have been more doubtful, tho' I will not give any Opinion even in that Case; but here they are spoken in Reference to his Office of Chancellor, and of one that was then in Commission of the Peace, and stood Candidate for a Member

ber of Parliament; and in that Respect they are as reproachful as can be, they wound his Reputation, and craftily obstruct his Election.

Object. They are not spoke with Reference to his Office.

Ans. But they are; for they are spoken of one in an Office of Trust, and having Administration of Justice, and spoken expressly in that Capacity, There goes your rare Chancellor: And it cannot be taken here that the Word Chancellor was only meant for a Description of the Person, but rather an Indication of Capacity in which he did suborn the Witnesses; and it is not material to shew, that any Woman did swear against a Parson before him; for if there did not, then the greater Falshy and Scandal, and the Word Subornation is always taken in an ill Sense. 3 Inst. 167.

That the Word Chancellor was an Indication of his Capacity, &c. And the Word Subornation, is always taken in an ill Sense.

Obj. 1 Roll. Ab. 51. Yelv. 72. Thou hast procured 7. S. to come 30 Miles to commit Perjury before the Lord Bishop of Winton, and gave him so much Money: Resolved the Action would not lie, because not said, That they did commit Perjury; and therefore no Offence.

Obj. It is not said, that he did, &c.

Ans. This very Case was adjudged actionable, 5 Jac. & 3 Cro. 93. Thou hast procured false Witnesses to swear in such an Action; held Action would lie, for it shall be intended in malam partem; Vid. 1 Vent. 50. 1 Lev. 180. He is a forsworn Justice, and not fit to sit on the Bench, spoke of a Justice of Peace, actionable; and Words are to be taken according to their general Acceptation; and the general Acceptation of these Words cannot be otherwise than criminal, 1 Cro. 14, 15. I have often been with Justice B. for Justice, but could get nothing but Injustice at his Hands, actionable; and it shall not be intended of any Demand of private Justice: Besides, these Words are spoke of one who designed to stand for Parliament-man, and with Intent to hinder his Election; and he quoted the Case of Sir Walter Clarges. To say of a Man, That he is a Papist, though not actionable in themselves, yet they were adjudged actionable, because spoke of one who stood for Parliament-Man: The like Judgment in the Case of one Stowell, since. Hard. 103. You and your Crew brought the late K. to Death, actionable; though it might be said, That they only attended him to the Place of Execution: Yet because the Words sound in Scandal, and that the common Acceptation and Construction of them must be, that they were concerned and busied in bringing the K. to Death; and concluded for the Plaintiff.

R. Words to be intended in malam partem, and according to their general Acceptation. Yelv. 72. acc. Sed Cro. Car. 337. Cro. Jac. 151. contra. See Skinner 183, 364. Carth. 330, 400, 498.

Powys doubted how it would be, if the Words had no Relation to his Office, or spoke of a Man not in Office; but held them actionable here, for these two Reasons, viz. Spoke of a publick Officer, and in Reference to his Office; for he held the Word Chancellor was not a designatio Personæ, or as his Name, as Parson or Dean is; but an Innuendo of his Corruption quatenus such, i. e. quatenus a Chancellor: And he denied the Case in 1 Roll. Abr. 79. p. 2. but agreed, 2 Cro. 190. Thou art forsworn in Collet-Court,

Obj. Actionable because spoke of a publick Officer, and in Reference to his Office.

Vide Cro.
Jac. 158.
1 Danv. 107,
153.

and same Book, 436. Thou art perjured, for thou art forsworn in the Bishop of G's Court, not to be actionable; and would distinguish those Cases from this, because spoken here of an Officer, and with Relation to his Office: Subornation is a known Term in the Law, and is the Word of Art for corrupting one to commit Perjury, 3 Inst. 167. The Statute of 32 H. 8. c. 9. speaks of Subornation of Witnesses: 5 Eliz. c. 9. Subornation of False Procurement of a Witness, Vid. 1 Lev. 118. Hard. 501. Mo. 243.

Per Anderson, A private Man cannot be slandered but by particular Words, but general Words suffice to slander a Magistrate; and concluded pro Quer'.

1 Vent. 59,
60.
R. That the
Words are
express as to
Subornation.

Powell contra: 1. He agreed, the Phrase of Expression was as direct as if the Defendant had actually said, That the Plaintiff had suborned Witnesses to swear against the Parson: I cannot well find whether my Brothers think the Words actionable in themselves, if spoken of any Person whatever, or by reason of a Relation to his Office, or other Circumstances of the Plaintiff on the Declaration; but I hold them not actionable upon any Account.

2. Not without a Relation to his Office; one cannot be a Suborner of Perjury, without there be a Perjury committed: One indeed may suborn to swear, and yet no Oath taken; or an Oath may be taken, and yet it be no Perjury, for it does not appear to be in any Court of Justice; the Case in 3 Cro. not like this, for here is neither Court or Cause mentioned, where the Swearing was; and he agreed the Case in Cro. Jac. 158. for there was a Perjury said to have been committed: And as to the Case in Hard 501. a Perjury is likewise charged; It is not actionable to say, That one did forswear himself; a fortiori, how can the suborning one to forswear himself, be Slander to bear an Action? And Subornation, Ex vi termini, does not import a Subornation of Perjury; and the Case in 1 Roll. 79. is much stronger than this; Subornation indeed is never taken in a good Sense, no more is Forswearing, yet no Action lies for saying a Man did forswear himself.

It does not
appear any
such Case was
before the
Plaintiff.
2 Cro. 143.

Then as to the Relation of these Words to his Office, or that he alleges himself to be a Justice of Peace, and Candidate for Parliament: I agree, Words spoke of a Magistrate will bear Action, that would not do so if spoke of another, but they must touch him in his Office: If there had been a Case in which a Parson had been Party before the Plaintiff, and Women had been sworn in it, and that had been set forth, then these Words might be applied by Innuendo to that, and ideo actionable. Vid. Cro. Jac. 30. Yel. 220, 221. And the Word [Chancellor] does not necessarily import, that this was charged upon him in his Office of Chancellor; and Words must be either actionable in their Nature, and bear Action if spoke of any Body, or scandalize him in Office, &c. to bear an Action.

[Chancellor]
does not ne-
cessarily im-
port his Of-
fice.

Holt,

Holt, Ch. Just. acc. My Brothers for the Plaintiff are not well agreed, whether the Words be actionable in themselves, but rather incline not; and I think they have great Reason for that Opinion, because here is no Charge upon the Plaintiff of any Subornation of Perjury, or that he did suborn Witnesses to forswear themselves: And suppose it were the first, and no Colloquium of any Cause, or Court where there had been an Oath, it would not be actionable; nor is there any Precedent for it, and there is reason there should not: For to say a Man has forsworn himself, is not actionable; Ideo not to suborn Witnesses to forswear: But the Words are not so strong in this Case, for they are, that he did suborn Witnesses to swear; sure the Suborning Witnesses to swear is no Crime, and Suborning Ex vi termini is not a Crime otherwise than it relates to Perjury; and Suborning Witnesses to swear, does not imply that they do swear; and in the Case in 1 Ro. 79. lays a Colloquium of a Suit in Chancery, and Witnesses sworn there: So first one would think here was a Subornation of Perjury; and the Words go farther, and say, that he would sue in the Star-Chamber for it, a proper Court to punish Perjury in; yet held not actionable: Then how do these Words touch him in his Office? For if a Chancellor will suborn Witnesses to swear, does this relate to his Office? If he does it in another than in a Spiritual Court, it cannot; if it be in a Spiritual Court, it may not be before himself: In short, it does not appear to have been before himself, and we must not intend it to maintain an Action: And the naming him Chancellor is no more, and so commonly understood, than a designatio Personæ, as Mr. Chancellor: To make Words actionable in themselves, it is necessary to charge some scandalous Crime by them: If a Communication had been laid concerning an Oath which a Man had taken in a Court of Justice, and that the Man did forswear himself, that had been charging him with Perjury, and therefore actionable: But barely to say, That a Man did forswear himself, or suborn another so to do, is not charging an Offence punishable, and therefore not sufficient to ground an Action; and concluded for the Defendant. And the Court being thus divided, the Question was about the Judgment, If Rule be for a Cause to stay till the Court be further moved, and the Court is divided, there need no new Rule from Court, and the Plaintiff without more may enter Judgment upon the Verdict; But if the Case be ruled to be put in the Paper for Argument, or last Rule be a Cur' adv' vult, and the Court be divided, there can be no Judgment: And the Case of Iveson and More stands upon that Point to this Day.

Ch. J. Here is no Charge of any Subornation of Perjury, &c.

Suborning Witnesses to swear, no Crime, &c. Ld. Raym. 887.

These Words do not touch him in his Office.

What is necessary to make Words actionable in themselves.

How Judgment may or may not be when the Court is divided.

Ld. Raym.

495.

1 Barnes 327.

2 Barnes 366,

371.

Stra. 379,

380, &c.

Vide *Black-*
by's Cases

228, 229.

2 Salk. 442.

Motion to

quash an Or-

der for Pay-

ment of the

Wages of a

Labourer,

&c.

See Skinner

80, &c.

Ld. Raym.

820, 1305.

Stra. 8,

1002.

Dyer 265. a.

Jenk. 135.

Vide 9 Co.

88.

Mo. 698.

1 Brownl. 62.

Obj. That the

Statute only

extends to

Labourers in

Husbandry.

Ante 91.

Domina Regina *versus* London.

AN Order for Payment of Labourers Wages, did recite the special Matter, viz. That two Persons were retained by the Defendant, being Overseer of the Works of the King's Garden at Hampton-Court, at so much a Day, and employed in Garden-Work there; and the Order made to enforce Payment, and removed by Certiorari from Hicks's Hall: And to have it quashed, was now moved: For the Justices have no Power by the Statute of 5 El. c. 4. to order Payment of the Wages of a Coachman, Footman, or any other Labourer or Servants, but such as are Labourers in Husbandry: They cannot make Orders upon Bricklayers, Carpenters, &c. Works; but in case of Servants in Husbandry, where the Justices may settle their Wages, and force them to serve by the Act of Parliament, they may compel Payment; and the Justices have Power to regulate Wages in Abundance of Cases, where they cannot compel Payment; and the Case of the Queen *versus* Corbet, here before, and Fitz. N. B. 168. Bro. tit. Labour, were quoted, and this Distinction was taken; If the Order had been generally for Wages, there the Court would not intend it to be other than Wages in Husbandry, and it might hold; but where on the Face of the Order it appears otherwise, as here it does, it is in it self void as touching a Matter whereof they have no Jurisdiction, and indeed it does not appear that this was for Wages settled by Justices, and they never did pretend to a Jurisdiction but where the Wages was settled by them: Then this is a Question of Jurisdiction, and Acts of Parliament concerning Jurisdiction ought to be taken strictly; and all the Matter of Equity that may be urged on the other Side, is shut out by this one Answer, That it is against a positive Law.

R. The Justices have exercised this Jurisdiction ever since the Statute, and Work in a Garden is Service in Husbandry, &c.

Broderick contra. 1. This Jurisdiction has been exercised by them ever since the making of the Statute, which is a great Argument of Right: He quoted Pasch. 3 W. & M. King & Queen, v. Jammer, where it did not appear to have been a Service in Husbandry; and there it was held, they could enforce their Order by Commitment; and he insisted, that Work in a Garden was a Service in Husbandry; and they have always been allowed a Jurisdiction in that Case: And taking the several Clauses of the Statute together, they necessarily intend to give Remedy by the Justices in all Cases of this Kind. Sect. 7, & 15. they are to fix and settle Wages and Day-hire of Labourers, and so of Apprentices in Husbandry: Sect. 14. That a Party retained shall not go, if he be duly paid, till the Work be finished, under Penalty of a Month's Imprisonment, to be inflicted by the Justices: Sect. 18. They are to convict Masters for keeping contrary to the Act: Sect. 37. All Justices are required to make special and diligent Inquiry into the Breaches made of any of the Branches of this Statute. If then by this Statute they are to ascertain Wages and Day-hire, to examine and punish Masters that give more, or Servants that

that will take more, than the established Rate; if Servant cannot leave Master without Leave, but that they may punish him, and that all Offences contrary to this Act are determinable by the Justices; Why shall not they, by Virtue of those comprehensive Words, compel Payment of such Servants and Labourers Wages?

Holt, Ch. J. Two Questions may well arise here: 1. Whether the Defendant be bound to pay those Wages at all? For if he be employed as a Surveyor of this Work, and brings in others, and agrees with them, it may well be that he shall be chargeable by them: As if I put out Cloth to a Taylor, and he employs Journeymen to make it up, he, and not I, shall pay them, and he by me is to be paid for the whole Work. It may be on the other hand, the Contract was not made by the Defendant upon his own Credit, but upon the Credit of the Crown; and neither appears on the Order, but it only says, the Retainer was by him.

Ch. J. It does not appear, whether the Contract was upon his own Credit as Surveyor, or on Credit of the Crown.

2. Suppose the Contract be with him, and upon his Credit, whether a Gardiner working for Day-labour in a Garden, be within the Power given to the Justices in Point of Payment of his Wages? And what sticks with me is, why they should have Power over Wages and Day-labour in Husbandry, and not in Cases of other Labourers: You say, it is by Implication the same, because of the Powers given to them by the Statute over such Labourers: And he remembered an Order made upon my Lord Ossulston, for his Coachman's Wages, which was quashed; and said, Sure they cannot order a Journeyman Taylor his Wages, or Hire; and their having exercised this Jurisdiction all along, will not make it legal, if without Foundation; and in that Respect it is not like Suit in the Admiralty for Seamen's Wages, for that may stand upon this Reason: The Admiralty is a Court Time out of Mind, and it may be by ancient Custom they have Jurisdiction over Seamen's Wages; but this here is a Jurisdiction set up within Memory of Man: Ecclesiastical Court have Jurisdiction of Wills and Testaments, but not by Commune Jus, but by Prescription, and no Act of Parliament is to give them Jurisdiction: But it is said in Hensloe's Case, and so in Selden, That it was given to them by the Laws of the Kingdom, and it is not so any where but in England; so since the Case of Seamen's Wages was always determinable in the Admiralty, we must now understand that it had a legal Commencement.

2. If for Labour in a Garden be in the Justices Power.

That they cannot order a Journeyman Taylor, &c. his Wages or Hire.
2. Skinner 671.

And at another Day, the Order was quash'd per tot' Cur', for that it appeared upon the Face of it not to be for Labour in Husbandry; but if that had not appeared so, we would perhaps intend it Husbandry, but now there is no Room for such an Intendment.

The Order quash'd, it appearing 'twas not for Husbandry.

Carleton *versus* Mortagh.

1 Salk. 268.

S. C.

Ld. Raym.

1005. S. C.

Ante 113,

114.

Vide *Dave-**nant's Case.*

Post 235.

Error of a

Judgment in

Debt, and

Want of Ori-

ginal assign'd

for Error.

Noy 83, 84.

Latch 152.

1 Sid. 39.

1 Lev. 99.

1 Keb. 225.

Farell 104.

Qr. 1 Show.

213.

Ante 113,

134, 174.

Carth. 70,

200, 339.

Post 235.

Argument,

That the

Court may

award a *Cer-**tiorari ad in-**form' conscient'**Cur'*, tho' De-

fendant can-

not demand

it.

Cas. temp.

W. 3. 320.

Cas. temp.

Mac. 318,

319.

1 Mod Cas.

in L. & Eq.

31, 331,

327.

3 Wms. 315.

Stra. 765,

819.

Latch 152.

accord.

Cas. temp.

W. 3. 317.

If the Court
may send a
Certiorari af-
ter *In nullo*
est erratum
pleaded.
Carth. 339.

Error of a Judgment in Debt by Confession in the Common Pleas, and Want of Original assigned for Error, and certified. Defendant pleads a Release, but no Venue is laid; whereupon the Plaintiff demurs, and the great Question now was, Whether the Court, being informed that there was an Original below, could by Law award a *Certiorari ad informand' Conscient' Cur'*, before they revers'd a Judgment for a just Debt?

Gould. We may do it, and this Case stands upon its own Foot, and distinguished from other Cases: And in all Cases where the Court after Demurrer over-ruled against the Defendant, or ruled for a Plaintiff in Error, or let in to examine the Record for Error before Reversal of the Judgment, they ought to award a *Certiorari* to have the whole Record below before them, though now the Defendant cannot of Right demand it; for notwithstanding any Confession or other Plea of the Defendant admitting Error, yet if no Error appear to the Court on Examination of the Record, they shall affirm the Judgment. 21 Ed. 3. 54. If a Fact be pleaded in Bar of Error, as a Feoffment or Release, says the Book, and Issue is taken thereupon, and found for the Plaintiff, which is this very Case, yet the Court shall examine the Judgment; and if no Error appear to them therein, shall affirm it. And tho' Error be assigned in the Want of an Original, yet since there may be an Original below, the Court upon their Examination of the Record, cannot be barred from awarding a *Certiorari* to be certified thereof. It is true, formerly, as appears by 28 H. 6. 10. It has been held, That after *In nullo est erratum* pleaded, the Court would and ought not to inquire farther, and that the whole Record must be presumed to be laid before them; but since the Books are very full, that after *In nullo est erratum* pleaded, though a wrong original be certified, the Court may be informed that there is a right Original, and they ex Officio ought to award a *Certiorari* for it to affirm the Judgment. 7 Ed. 4. 25. 1 Ro. Ab. 764, 765. 2 Cro. 60. Latch 152. 1 Jo. 139. 5 Co. 36. Bishop's Case, which in Truth was after a Nil dicit & remanet indefens. tho' Coke reports it to be after *In nullo est erratum*. And this I take to be a strong Authority for me, for the Release in our Case does not confess more than that does, and yet there the Court did grant a *Certiorari*. In some Books, it is said to be discretionary in the Court to do it or not; and if so, Can we have a better Motive of our Discretion, than here to affirm a Judgment for a just Debt, where a Release of Error is unfortunately ill pleaded: And concluded for *Certiorari*?

Powys acc. It has been held formerly, that *In nullo est erratum* was a Demurrer on what was produced of the Record; but in 9 Ed. 4. 32. b. adjudged that Court may at Discretion send *Certiorari* after *In nullo est*, &c. pleaded; and Bishop's Case allows that, and Jo. 140. and

and Latch 152. that after the Plea pleaded, the Party cannot pray Certiorari, and if he does, it shall not go at all; and the Entry ought to be that it was by Court, and not at Prayer of Party, and no Difference between this and In nullo est errat. in Point of Reason, for one is Matter of Law, and the other of Fact: And why should it be when the Issue in Law is against him, and not when the Issue in Fact is? And in those Books it is said, that the Court may send Certiorari, as well to reverse as to affirm, after In nullo est erratum.

1 Leon. 22.
Noy 83, 84.
1 Sid. 109.
Vide 1 Co.
36.
5 Co. 37.

Powell acc. The Release being as none, because not well pleaded, does not tie our Hands, but that we may award a Certiorari to know whether this is Error or not; and the Court may do it to be informed of any Error in Law, where they are not foreclosed by the Act of the Party, and this is such. And where-ever the Court are not barred from examining the Errors on the Record, they may inform themselves thus of the true State thereof, tho' the Parties have foreclosed themselves of that Advantage by Pleading or Confession; for they must affirm or disaffirm the Judgment, upon View of the whole Record, according to their Knowledge and Conscience, without Regard to Party's Admission, and therefore ought to know of their own Knowledge whether there be Error in Law, and not to rely upon the Party's Admission. 2 Ed. 4. 32. is the first that I find in the Books of Certiorari's ex Officio Cur. and there the Parties agreed the Record as removed to be perfect, and yet the Court did award a Certiorari. And I cannot tell but in many Cases the Court are bound to do it, especially to affirm a Judgment. It cannot be at the Prayer of the Parties, because they have estopp'd themselves by their Plea, and in some Cases the Court have denied it to reverse a Judgment. Palm. 520. Young *versus* Young. Infant brought an Original, in which Case he need not find Pledges; but if he come of Age before Judgment, he ought to add them, and that being the Case, Want of Pledges was assigned for Error, and there the Court would not grant a Certiorari to make Error, and with this agrees the Case in Jo. 139. and Latch 152.

This Release as pleaded, is as none, and therefore the Court is not foreclosed by Act of the Party.

The Difference is between the Case of the Plaintiff in Error, and of the Defendant: If the Plaintiff assign Error, and take a Sci' fa' ad audiend' Error, and that it is returned served, and then the Plaintiff is nonsuited, or enters a Retraxit, the Court without more will affirm the Judgment. 21 Ed. 4. 38, 39, 44.

Another Difference is between Errors in Law and Errors in Fact: If Error in Fact be alledged, and In nullo est Erratum pleaded to it, or a Release, and that found against the Pleader, that is a Confession of the Error, and the Court thereupon shall without more reverse the Judgment; but pleading a Release of an Error in Law is not so, for a Release will not make that Error that is not so, as appears to the Court on Record; but the Release there is only a Bar of the Averation of the Suit of the Writ of Error, for the Court cannot proceed but upon a Writ of Error, and the Release may bar that; but if Release be pleaded which does not bar the Writ, the Court may proceed to examine the Record: And

Difference between Errors in Law, and Errors in Fact.
Cal. temp.
W. 3. 560.

And so is the Case, 21 Ed. 3. 54. And where-ever they can go to examine Errors, there they must take all legal Ways to be informed of the whole Record. And he quoted the Case of *Done versus Smithers*, which was, 1 Cro. 415, 416. 1 Jo. 373, 374.

Bishop's Case.
Vide 1 Cro.
84.
Mo. 700.
1 Leon. 22.
Yelv. 117,
118.
1 Roll. 754,
755.
1 Keb. 225.

And as to Bishop's Case, as reported by Coke, it was after *In nullo est erratum* pleaded, but there the Party took out a *Certiorari* without Leave of Court, and they held he could not have that Writ after that Plea, whereby he had concluded himself, but that the Court might ex Officio award it; and tho' it was annex'd to the Record by the Act of the Party, yet the Court took it off, and awarded one themselves. 7 Ed. 4. 16. Br. Err. 165. Fitz. Err. 4. The Difference between Error in Fact and in Law: Fact may be confess'd, but Error in Law cannot, so as to tie up the Hands of the Court; for tho' the Party does confess the Want of a Writ Original, Cap. &c. the Court cannot take his Word, and reverse the Judgment, but they must inspect the Record, and be informed. And the Form of Entries in case of awarding *Certiorari ex Officio*, is quia expediens Cur. videtur, to know whether there be such a Writ or not.

Certiorari ex Officio.
See Skinner
419 to 422.
Ante 194.

Obj. The Nature of this Error is such as may be confess'd, for it is only whether there may be such a Writ or no.

Answer. But it is Matter of Law, whether there be Original in the Cause or no: And concluded to award the Writ.

Ch. J. against
the *Certiorari*.

Holt, Ch. J. contra. I am glad my Brothers can be against me in this Case for supporting a Judgment, but am sorry I cannot agree with their Reasons.

The Question
is, Whether
the Plea in
Bar, as plead-
ed, be good
or not?

Done and Smithers's Case.

1. Because the Question now before us is not whether there be Error or no, but whether the Plea in Bar be good as pleaded. When Error is assigned, and *In nullo est erratum* pleaded, or a Default is made, there the Matter of Error is the Question before the Court; but now the Matter put in our Judgment is, whether the Plea be good or not; so that now we are determining another Question than is in Judgment before us. If *In nullo est erratum* be pleaded, or a Default made, no Doubt the Court may award a *Certiorari*. In *Done and Smithers's Case*, that which was assigned for Error, appeared to the Court to be no Error; then the Matter pleaded in Bar of that Error, tho' against the Defendant, was impertinent, because it appeared to the Court to be no Error. If in Debt upon a Bond the Declaration be bad, and the Plea in Bar be so too, yet Judgment shall not be for the Plaintiff upon the bad Bar, but against him, because the Declaration appearing bad, the Bar was insignificant: So in Writ of Error, if Release be pleaded, and Issue thereupon found for the Plaintiff, if there appear no Error on the Record, the Judgment shall be affirmed, because the Court are to judge of the whole Record before 'em. If a bad Plea in Bar be to a bad Declaration, or to a bad Assignment of Error, it is idle, and the Court shall take no Notice of the Insufficiency of it, but shall judge on the Record. And so agrees the Case of 21 Ed. 3. that notwithstanding a

Release

Release found for the Plaintiff in Error, yet if there be no Error, Judgment shall be affirmed; but here is apparent Error, viz. the Want of an original in an Action in the Common Pleas: Suppose then the Defendant had not come in gratis, and pleaded a Release, but the Plaintiff had assigned Errors, and taken out a Certiorari, and it were certified that there was no Original, and then the Defendant had come and pleaded the Release, as here; you would not in that Case have granted a Certiorari, and yet you might as well do it then as now; for now the Defendant by coming in gratis saves the Plaintiff the Trouble of a Certiorari, and admits Error, but pleads a Release: So it appears to the Court, there is a good and substantial Error, and that the Defendant has not barr'd it by his Plea, therefore it is not in Judgment before the Court whether there be Error or not, that being apparent on the Record before them.

2. This is a Demurrer to the Plea in Bar, and the whole Event of the Cause is put in Judgment upon the Demurrer: When there is a Demurrer and Joinder in it, the Court is bound to give Judgment upon that; now if you award a Certiorari here, you strike the Plea, the Demurrer and Joinder in it out of the Case, and was such a Thing ever done? If it be certified, that there is an Original, what will become of the Demurrer? For if you give Judgment upon Certiorari, you must set aside the Demurrer, for you cannot give Judgment upon both; for if you do, you must give it for the Defendant upon the Certiorari, and for the Plaintiff on the Demurrer, a manifest Contradiction: If Original be certified, and you give Judgment for the Defendant, you must waive the Demurrer put to your Judgment by Consent of Parties: And no Case is parallel to this; for consider you are not upon the Issue of Error or not, but upon the Point of Bar or not, for that is it the Parties demand your Judgment in.

3. The Want of an Original is confessed here as flatly as can be: Indeed the Assignment of Error is not compleat till a Certiorari returned for the Plaintiff; and here you for the Defendant have prevented him of that by coming in gratis, and admitting the Want of an Original; but depend upon it, he ought not to assign Error, because of his Release: So he having admitted it in this manner, both Parties demand Judgment upon the Release; and for the Court to go upon another Point than what is put in their Judgment by both Parties, is a kind of a Departure from the Point in Issue: 7 Ed. 4. 16. It is said arguendo, That if Error be assign'd out of the Record, as the Want of an Original, or the like; though the Defendant does confess this Error, the Court are not bound by such Confession; and that I agree, If the Question be, whether Error or not, as in an In nullo est erratum pleaded, or in Default to the Sci' fac', which are not full Admissions, but quasi Admissions, and not near so full as Pleas in Bar; but where the Defendant agrees that there is Error, but insists upon it that the Plaintiff released it, the Court does not go so far as to say, that they may scruple, and send a Certiorari there too. If the Defendant in Error comes in before any Certiorari, and pleaded a Bar, and a Demurrer is thereunto, and it never was questioned but he might well do so, and then it would be the same Thing as if it had been

Vide Keb.

225.

2 Cro. 443.

Godb. 407.

That the whole Event of the Cause is put in Judgment upon the Demurrer.

2 Keb. 27.

Pl. 21.

That the Want of an Original is flatly confessed, and both Parties demand Judgment on the Release.

1 Keb. 91,
211, 225.

2 Cro. 6,
141.
1 Jo. 141.
that it be in
both Cases.

How upon a
Judgment in
Wales, *ideo
conf.*, &c.

been certified no Original: If so, suppose, instead of Demurrer, Issue had been upon this Plea, and found for the Plaintiff, would you in that Case award a Certiorari? Yes: You must maintain it, that you are at Liberty even after a Verdict, to try whether the Trial was to any manner of Purpose: And what will the Consequences of these Things be? No doubt, after *In nullo est erratum* pleaded, the Court may grant it, though the Party has foreclosed himself from praying it; but if the Court be informed, that Matters are right below, I think, *ex debito Justitiæ* in that Case, they are bound to send for it; and where they can do, I say, I think, *ex debito Justitiæ*, they ought to do it. It has been said, They could not do it to reverse a Judgment; tho' there are other Opinions to the contrary, 3 Cro. 836, 837. it was granted; so is 2 Cro. 445, 446. If the Plea-Roll be certified, and it appears to be erroneous, the Defendant before *In nullo est erratum* pleaded may alledge Diminution, and get the Roll amended below, and certified up right; and an Amendment may be below in the Body of the Record, even after *In nullo est erratum* pleaded; and that is the Reason, that upon Diminution alledged we order the Clerk of the Treasury to attend, where there is an erroneous Judgment through Fault of the Clerk, as in the late Case of *Morrison v. Fanshaw*; where the Judgment was in a *Sci' fac'* upon Recognizance upon Writ of Error for Costs for Delay of Execution, the right formal Way had been to have it amended below, and to send a Certiorari to have it sent up as amended; but we take a summary Way, desiring them to get it amended below, if it may be; and upon the Clerk's coming up, it is set right here: And he quoted the Case of *Gwyn and Gwyn* 30 Years ago; Judgment was in Wales, *ideo confid'*, &c. *quod querens teneat*, instead of *recuperet*; and this held to be Error, and great Endeavours made to have it amended: The Docket-Book was right, and the Court said, If the Docket had been made they would amend by it; and he put the Case of *Done and Smithers*.

Anonymus.

Indictment
against Qua-
kers for keep-
ing their
Shops open,
quash'd.
Vide Hob.
251.
Cas. temp.
An. 114.

SEveral House-keepers, being Quakers, were indicted for keeping their Shops open on a Day ordained by Proclamation for a publick Humiliation and Prayer; and because they were several distinct Crimes in every distinct Offender, and therefore not to be joined in one Indictment, it was quash'd.

Powell *versus* Ball.

'Tis a Con-
tempt to hin-
der a Bailiff
to arrest a
Man.

Vide ante

IF a Bailiff has a Warrant to arrest a Man, and another hinder him from doing it, there being no actual Arrest, it is not a Rescous, yet it is a Contempt of the Court. Vide prox. pag.

2

Per

105, 173. Post 211. 1 Cro. El. 909, 910, 753. Yelv. 28. 2 Rol. 294. Hob. 62, 263. Owen 63.
11 Co. 82. 12 Co. 131. Cro. Car. 537, 538. Cro. Jac. 280, 556, 486. Cas. temp. W. 3. 247.

Per Cur', Where a View is proper, there upon Motion before Trial we will grant it, in like manner as we used at the Assizes, and that is after the Jury sworn, and then it must be by Consent, and a Jury withdrawn.

2 Salk. 665.
Rule, upon
granting a
View where
proper.

And per Holt, Ch. Just. I think we may award a View without Consent; and notwithstanding this View, a Jury may be challenged when he comes to be sworn.

Wilson versus Gary.

IN Case against him for Rescuing a Person arrested on mean Process at the Plaintiff's Suit.

Vide 1 Salk.
79.
2 Salk. 586.
Ante.
In case for
rescuing a
Person ar-
rested, at the
Plaintiff's
Suit, &c.

At Nisi prius, coram Holt, Ch. Just. in Middlesex, The 1st Point of Evidence was the original Cause of Action.

2. The Writ and Warrant, by producing Copies of them sworn, to be examined and true.

3. The Arrest shewing the manner of it, that it might appear to the Court to have been legal, for otherwise there could be no Rescous; and in Point of Damage, they proved the Loss of their Debt, for that the Prisoner became insolvent, or could not be had.

Ante 165,
173, 210.

But as to that, Holt, Ch. Just. said, In case of Rescous you shall have no Favour, because guilty of a Violence against the Process of the Law, and therefore not like the Case of a negligent Escape.

Vide ante
141, 210.

Note; The Case upon Evidence appeared thus; The Bailiff stay'd below at the Street-door, and sent his Follower with the Warrant up three Pair of Stairs in Disguise, who there laid hands on the Prisoner, and told him, he arrested him: The Prisoner, with the Assistance of some Women, got from him, and run down to the first Floor; and the Defendant being below in his Shop, and hearing the Noise, ran up before the Bailiff, open'd the Door, and put the Prisoner in, and would not suffer the Bailiff to go and take him.

The Case.

And Holt, Ch. Just. seemed to doubt whether this were a good Arrest, being only by the Bailiff's Servant, or if it had been done by the Servant even in the Bailiff's Presence; but yet charged the Jury generally, who found for the Plaintiff: But he ordered the Postea to be stayed till he had marked it.

Whether the
Arrest by the
Bailiff's Ser-
vant was
good.
Vid. Pa. 210.

Here the Party rescued appeared, and was sworn as a Witness for the Defendant, not being made Party to the Action: Which Holt, Ch. Just. hesitantly allowed upon the Reason that he swore to charge himself, if by his Evidence he discharged the Defendant; but said, It was what he never had seen before, and that if the Defendant was guilty of the Rescous, he could not but be particeps Criminis: However he was sworn, and his Credit left with the Jury.

The Party
rescued al-
lowed as a
Witness, and
why.
Vide 3 Mod.
114, 115.
Cal. temp.
W. 3. 338.
Ld. Raym.
396, 730,
731, 733,
1043, 1104.

Domina

Vi. 1 Hawk.
cap. 65.
Blackerby's
Cases 211,
212, &c.
Upon an In-
dictment for
a Riot against
a great Num-
ber, to try it
only against
3 or 4, &c.

Domina Regina *versus* Middlemore.

A Great Number of People were indicted for a Riot; and it was moved, That the Prosecutor should pitch upon three or four of them, and try it only against them, the rest entering into a Rule, if they were found guilty, to plead guilty too; and this was said to be done frequently to prevent Charges of putting them all to plead; and the Rule was so.

Judgment
upon a War-
rant of Attor-
ney, when to

If Judgment upon a Warrant of Attorney be not enter'd with-
in the Year, it cannot be without Leave of Court on Motion.
be entered. Ante 14, 191, post 288. Ld. Raym. 850. Stra. 639, 718, 882.

Baldwin *versus* Cole.

In Trover.
for that the
Surveyor of
the Queen's
Yard detained
the Carpen-
ter's Tools
upon a pre-
tended Usage.

IN Trover at Nisi prius, coram Holt; Ch. Just. upon Evidence the Case was this: A Carpenter sent his Servant to work for Hire to the Queen's Yard; and having been there some Time, when he would go no more, the Surveyor of the Work would not let him have his Tools, pretending a Usage to detain Tools to enforce Workmen to continue till the Queen's Work was done, and a Demand and Refusal being proved at one time, and a Tender and Refusal after.

Where the
very Denial
of the Goods
is a Conver-
sion.

1 Lev. 173.
10 Co. 56.
1 Cro. 262.
Q. 2 Salk.
655.
1 Danv. 21.
L. 2.
2 Mod. 245.
3 Mod. 2.
5 Mod. 426.
2 Show. 148,
175.
b. 213.
Caf. temp.
W. 3. 344.
1 Mod. Caf.
in L. & Eq.
177, 322.
Stra. 60,
128, 142,
505, 576,
651, 1078.
Defendant
guilty to Part, and not guilty as to the Rest.

Holt, Ch. Just. The very Denial of Goods to him that has a Right to demand them, is an actual Conversion, and not only Evidence of it, as has been holden; for what is a Conversion, but an assuming upon one's self the Property and Right of disposing another's Goods, and he that takes upon himself to detain another Man's Goods from him without Cause, takes upon himself the Right of disposing of them; so the taking and carrying away another Man's Goods, is a Conversion: So if one comes into my Close, and takes my Horse and rides him, there it is Conversion; and here if the Plaintiff had received them upon the Tender, notwithstanding the Action would have lain upon the former Conversion, and the having of the Goods after would go only in Mitigation of the Damages; and he made no Account of the pretended Usage, but compared it to the Doctrine among the Army, That if a Man came into the Service, and brought his own Horse, that the Property thereof was immediately altered and vested in the Queen, which he had already condemned: And here one of the Particulars in the Declaration being ill laid, the Defendant was found not guilty as to that, and guilty as to the rest.

Regina *versus* Foxby. Vid. antea 11, & 178, post 239.

She brought a Writ of Error of a Judgment against her upon an Indictment for being a common Scold; and upon Affidavits, That she was so ill, that without Danger of her Life she could not come up out of Kent, where she lived, to assign Error in Person, according to the Course of the Court, it was moved by Broderick and Wells, That she might have Leave to assign Error by her Clerk in Court: And Wells said, He knew no Law for ducking of Scolds.

Per Cur', Scolding once or twice is no great matter; for Scolding alone is not the Offence, but the frequent Repetition of it to the Disturbance of the Neighbourhood makes it a Nuisance, and as such it always has been punishable in the Leet, and ideo indictable: And we have of late indulged People upon Writ of Error of Judgments on Indictments, to appear by Attorney: And here they enlarged the Time till next Term, to see how she would behave her self in the mean Time: For Holt, Ch. Just. said, Ducking would rather harden, than cure her; and if she were once ducked, she would scold on all the Days of her Life.

And in Michaelmas Term her Husband and she came into Court, and Broderick, That they might assign Error, which they did. Vid. post 239.

Inhabit' Paroch' de Westbury in Com' Wilts *versus* Inhabit' de Costham.

A Poor Woman with Child was removed by Order of two Justices from W. to C. and before the Sessions brought to Bed there, and then the Order was quashed upon Appeal.

from W. to C. and delivered there before Sessions, &c. Cas. temp. W. 3. 322, 323, 383. Cas. temp. Mac. 26, 84.

Per Cur', The Child is legally settled in the Parish of W. from whence the Mother was illegally removed, for they shall not take Advantage of their own Wrong; and so it would have been if they had not known of the Woman's being with Child at the Time of the wrongful Removal: If a Woman with Child be travelling without Fraud of the Parish in which she is settled, and in such Travel is delivered of her Bastard, it shall in that Case be settled where it was born; secus if there be Fraud; and according to this was quoted the Case of the Parish of Bowham in Essex some Years ago: Vide 2 Bulst. 349.

Note; Also it appear'd upon the Order of Removal, that the Woman had a Husband who had left her seven Years before, but not said that he was dead, so it could not be a Bastard clearly.

Per Cur'; So both Points were clearly against the Parish of W.

Tracy *versus* Talbot.

Replevin upon a Distress for a Poors Rate upon Tenant of Part of a House, made before Quarter-day, by Vertue of a general Warrant, &c.

1 Vent. 350.
How one House originally entire, may become several, &c.

IN Replevin, the Case upon Evidence before Holt, Ch. Just. at Nisi prius, was this: The Plaintiff having been a Lodger in the Parish for some Time before, took Part of a House there the Third of December, and was rated to the Parish as an Inhabitant for the Quarter expiring at Christmas; and before Christmas the Distress taken for the Rate, by Vertue of a general Warrant made long before for the whole Year, first in respect of separate Tenements chargeable to the Parish.

Holt, Ch. Just. said, One House originally entire and undivided, may become several and divided, by dividing it into divided Partitions, and allotting them divided Avenues, so as the several Inhabitants have no Communication one with another: And in that Case, if the Owner of the House live in one of the separate Apartments himself, and an Inhabitant of another separate Apartment goes away, that Tenement which he occupied is not now an empty Tenement, but the Possession of it devolves upon the Owner, and that with the Tenement in his Possession before make now but one entire Tenement, for which he is ratable to the Parish: But if there be two several Tenements originally, and they become inhabited by several Families, who make but one Avenue for both, and use it promiscuously; yet, in respect of the original Severalty, they continue severally ratable.

But two Points were allowed by Holt, Ch. Just. to be found specially.

Whether one coming in three Weeks before Quarter-day, may be rated, &c.
Id. Raym. 798, 1009, 1013, 1280.
Stra. 745, 77, 100, 56, 1114, 1071, 393, 525, 630.

1. Whether if an Inhabitant comes into a Parish three Weeks before Quarter-day, he can be rated to the Parish for the whole Quarter?

2. Whether the Distress could be taken by Vertue of a general Warrant made before the Rate? And yet he was very clear in the Negative in both Points; for by the Statute, Poors Rates are to be made Monthly, and the Reason is, because of frequent Changes of Possession, in respect whereof only one is ratable; whereas at this Rate none could remove in the midst of a Quarter without being doubly chargeable.

3. He held, in no Case one could be taken up by Vertue of a Warrant made before the Offence committed, or by Vertue of a general Warrant, but where the taking would be justifiable without any Warrant at all, other than a Warrant in Law.

A 4th Point which Holt, Ch. Just. seemed not satisfied in, was, Whether when a Rate is made for a Quarter, whether they may distrain for it before the End of the Quarter?

But all the Jury said, That the constant Usage was to do it, and that to avoid the Mischief that would ensue if the Party should remove out of the Parish before the Quarter.

Whether a Distress may be for a Quarter's Rate before End of the Quarter, and it seems it may.

To which Holt, Ch. Just. answered; If he removed into another Parish in the same County, they might distrain by a War-
rant from the Justices, as well as in the same Parish; but if he removed out of the County, he agreed that Remedy failed: So
he gave Way to the Usage in that Point.

Remedy upon removing out of one Parish into another, &c.

Dod versus Monger.

In case for rescuing Goods, which the Plaintiff had distrained for Rent: The Plaintiff declared, that he was seised in Fee of a certain Messuage, &c. and so seised, demised it to J. S. for a Year, and so from Year to Year as long as both Parties should please, by a Parol Demise, reserving Rent; and for Rent-Arrear he distrained, and the Distress was rescued from him by the Defendant, for which the Action was brought: And here the Plaintiff having laid a Seisur in Fee in himself, was fain to prove it; and in proving the Lease, it appeared to be for a Year, and so from Year to Year as long as both Parties pleased; and that the Lessee should not go away without giving a Quarter's Warning: And it was insisted on by Eyre and Parker, That the Lease given in Evidence varied from the Lease declared on, so they failed in proving their Declaration.

Case for rescuing Goods, the Plaintiff had distrain'd for Rent upon Demise from Year to Year, &c. Vide Co. Lit. 47. b. Salk. 247. 1 Roll. Abr. 673. Cro. El. 720. 1 And. 71, 72. Cal. temp. An. 203, 204.

But per Holt, Ch. Just. It is well enough; for the Agreement concerning the Quarter's Warning is only a collateral Agreement, not at all affecting the Land in Point of Interest, but collaterally binding the Person of Lessee, and therefore it need not be mentioned in the Declaration: And in this Case, if at the Year's End the Lessee had given up the Possession without any Warning, he would be liable to pay a Quarter's Rent by Virtue of this Agreement; but if he had given a Quarter's Warning, he might quit without more ado; but if he once entered upon the second Year, he would be bound for all that Year, and to a Quarter's Warning, and so on; and so it would be if such a Lease had been by Deed: If a Lease be for a Year, and so from Year to Year, as long as both Parties shall please, that is a Lease binding but for one Year; but if Lessee, without Countermand, of Lessor, enter upon the second Year, he is bound for that Year, and so on: But if Lease be for a Year, and so from Year to Year, till six Years expire, that is a certain Lease for six Years: If it be for a Year, and so from Year to Year, as long as both Parties shall agree, till six Years shall expire, that is a Lease for six Years determinable at every Year's End at the Will of either Party. And likewise held, That if a Landlord come into a House, and seizes upon some Goods as a Distress, in name of all the Goods in the House, that will be a good Seizure of all: But he must remove them in convenient Time at Common Law; and now since the late Statute of W. & M. immediately, except it be Hay or Corn; and here, for that the Seizure was on Monday, though of Barrels of Beer, not easily removeable, if at all, without Damage, and no Removal till Wednesday, when the Defendant took them by Virtue of a Replevin, in which the Lessee,

The Agreement, That Lessee should give a Quarter's Warning was only collateral.

Note.

Distress when to be removed. Stat. 2 W. & M. ff. 1. c. 5. Ld. Raym. 54, 1424. Cal. temp. Mac. 265, 266. Stra. 717. 851, 1040, 1272.

8 Co. 146.

see, not the Distrainant, was made Defendant; and besides, the Plaintiff quitted Possession of them the two intervening Nights, and had not the Possession at the Time of the Taking by Vertue of the Replevin, without which there could be no Rescous: The Plaintiff was nonsuited. In this Case it appeared also, that the Distrainant drew Beer out of one of the Barrels; which, per Holt, Ch. Just. made him a Trespasser ab initio as to that Barrel only.

Rich versus Aldred.

Detinue upon
Bailment of
O. C.'s Pic-
ture, &c.
Vide 1 Salk.
223.

IN Detinue for Oliver Cromwell the Protector's Picture:

Per Holt, Ch. Just. at the Trial: If A. bail the Goods of C. to B. and C. bring Detinue against B. for them, B. may plead the Bailment to him by A. to be redelivered to A. and so bring in A. as Garnishee, to interplead with C. And if A. bail Goods to C. and after give his whole Right in them to B. B. cannot maintain Detinue for them against C. because the special Property that C. acquires by the Bailment is not thereby transferred to B.

Johnson & Ux' versus Browning.

Case for ma-
liciously in-
dicting the
Plaintiff's
Wife for
Felony.
Vide 1 Salk.
14, 15.
Ante 25.
Post 261.
5 Mod. 349,
405.
Materiam se-

quentem. Cas. temp. W. 3. 4, 208, 257, 273, 555. Cas. temp. An. 180, 181. Cas. temp. Mac. 145, 148, 149, 209, 210, 214, &c. 219, 220. 1 Mod. Cas. in L. & Eq. 227, 307, 308. Fitz-G. 43, 98, 173, 174, 175. Ld. Raym. 378, 380, 381, 377, 81. Stra. 114, 691. 1 Barnes 74, 318. Ld. Raym. 503.

How the
Plaintiff ought
to have pro-
ceeded in this
Action.

Ld. Raym.
190, 729,
730, 735,
738, 752.
Stra. 79.

Former Oath
of the Defen-
dant's Wife
allowed for
Evidence of
a Felony
committed.

IN Case for maliciously indicting and prosecuting the Wife for Felony, whereof she was acquitted: Declaration recited the Indictment, continent' materiam sequentem; and in the Recital of the Goods supposed to be stole, it was Valoris of so much; whereas the Indictment was Valentia of so much: And it was objected, That this was a Variance from the Indictment, but over-ruled; for that was the same in Substance, and so materiam sequentem; but if they had undertaken to set forth the Indictment in hæc Verba, it would have been a fatal Exception.

Nota; Per Holt, Ch. Just. To do the Business fully, the Plaintiff ought to have proved Copy of the Bill exhibited, and that it was found upon the Oath or Procurement of the Defendant; but their Names upon the Back of the Bill is sufficient Evidence of their being sworn to the Bill, tho' the Writing upon the Back be no Part of the Record: But it may be proved, That the Defendant was a Witness without having the Bill; but it were, I say, more clear to have the Bill: And the first Part of the Defendant's Defence in this Case, must be to prove a Felony committed; for without that it is impossible he could have a probable Cause of Prosecution; and here, because no Body was by at the Time of the supposed Felony committed but the Defendant's Wife, who could not in this Case be a Witness to prove the Felony committed, Holt, Ch. Just. allowed her Oath, which she made at the Trial of the Indictment, to be given in Evidence to prove a Felony committed; for otherwise, one that should be

be robbed, &c. would be under an intolerable Mischief; for if he prosecuted for such Robbery, &c. and the Party should at any Rate be acquitted, the Prosecutor would be liable to an Action for malicious Prosecution without a Possibility of making a good Defence, though the Cause of Prosecution were ever so pregnant.

To which Darnell for the Plaintiff said, If Oath had been made freshly after the Fact committed, that Oath might be admitted as Evidence of it; secus not; but here it appeared a Warrant was taken out immediately, but nothing done thereupon till the Defendant had subsequent falling out with the Plaintiff.

Obj. That the Oath ought to have been freshly made after the Fact.

And Holt, Ch. Just. said, The Fact of Pigot's Case in 1 Cro. was this: A Son-in-Law indicted his Step-mother for poisoning her husband his Father; and she being acquitted, brought an Action for malicious Prosecution against him, and recovered Damages against him; and he to requite her Kindness, brought an Appeal of Murder; Whereupon she was tried, and convicted at the King's Bench Bar, and carried down, and burnt in Berkshire, where the Fact was committed. And he remember'd another very lately, where a Fellow brought an Action for saying of him, He was a Highway-man; and it appearing upon Evidence that he was so, he was taken in Court, committed to Newgate, and convicted and hanged the next Sessions: So People ought to advise well before they brought such Actions.

Cro. Car. 383.

And Darnell remember'd the like Fate, which befel a Client of his.

Bushell versus Pasmore.

DEED upon a Bond: The Defendant pleads, that the Bond was delivered as an Escrow to a third Person to be his Deed to the Plaintiff, upon his vacating a certain Judgment, which was not done, Et sic non est Factum, & de hoc ponit se super Patriam; without adding, Et præd' the Plaintiff similiter: The Plaintiff replies, That it was delivered as an Escrow to be delivered to him upon his Payment of 20s. towards vacating the Judgment, and Issue thereupon; that is, upon a Traverse of its being delivered as an Escrow to become his Deed upon vacating the Judgment; and on Evidence, it was sworn to have been delivered as an Escrow to become the Defendant's Deed upon the Plaintiff's vacating the Judgment.

1 Salk. 274.
S. C.
Vide 3 Keb. 142.
Debt upon a Bond: Plea, That it was delivered as an Escrow, &c. Et si non est Factum.
Repl', with a Traverse of Defendant's Plea, and Issue thereon.
Ld. Raym. 354, 356, 357.

And here Holt, Ch. J. held, That there is no Difference between delivering a Deed as an Escrow, to become the Party's Deed upon his doing such a Thing; and to be delivered to the Party as his Deed upon his doing such a Thing, for in neither Case it is his Deed till the second Delivery: And he said, If a Man delivers a Writing as his Deed to a Stranger, to be delivered by him to a third Person upon his doing such a Thing,

Where no Difference as to the Conditions of Delivery.

K k k

Vide Savil that 71.

that is a Deed ab initio in Trust for the third Person upon a Contingency: But upon the Saying in 5 Co. Periman's Case, 84. b. he was content to have the Matter found specially, but the Plaintiff was nonsuited upon another Point.

That these special *Non est Factum* are impertinent, and thereby Defendant brings all the Proof upon himself, &c.

Vide Savil

71.

1 Salk. 274.

And Holt, Ch. Just. said, In all his Time he never knew such a Plea as this; for all these special *Non est Factum*s, in Case of Escrow and Rasure, &c. are impertinent, for thereby the Defendant brings all the Proof upon himself; whereas if he had pleaded *Non est Factum* generally, he would turn the Proof of whatever is necessary to make it his Deed upon the Plaintiff: And it was agreed by all, that the Deed cannot be an Escrow to the Party himself.

Where a Defendant shall be compelled to plead *Instanter*, see Carth. 320.

Plea of another Action and Judgment therein. Ibid. 455, 456, ante 157.

D E

Term. Sancti Mich.

Anno 3 Annæ, in B. R.

Coram Holt, Chief Justice,
 Powell,
 Powys, } Justices.
 &
 Gould, }

Culliford's Case.

HE being acquitted upon an Indictment of Murder in the Country, and an Appeal brought, and Time given by the Judge of Assise till the next Assise to plead: In the Interim the Appellant brings an Habeas Corpus and Certiorari, to remove the Record and Body of Appellee up hither, and at a Judge's Chamber the Parties agreed, so that the Appellee was let go upon Bail. The Agreement being now perfected, and a Release given by the Appellant, and the Appellee appearing upon his Recognisance, Eyre moved to have him discharged, producing the Release, and a Counsel appearing for the Appellant to consent to it.

1 Salk. 382.
S. C.

An Appeal brought against one acquitted at the Assises upon an Indictment of Murder, &c.

Vide 1 Salk. 61, 62.
Carthew 16, 331, 395.
Skinner 48, 443, 553, 634, 670.
2 Hawk. ch.28.
Sect. 4. ch. 23.Sect. 124.
Motion to have the Appellee discharged.

Vide Kelynge's Rep. R. He must be arraigned here, and then he may plead his Release, &c.

Auterfoits Acquit.

pet 1 Salk. 382.
2 Hawk. ch.

But per Cur', The Certiorari and Habeas Corpus must be return'd here; and then when we are thus possessed of the Record, he must be arraigned upon it, and then he may plead his Release; or if the Appellant be not ready at the Return thereof to arraign him, and does not appear, he shall have a Sci' fac' to bring him to do it; and if he does not come at the Return thereof, he shall be nonsuited, and the Appellee is not thereby discharged; for here being a Record against him, he shall thereupon be arraign'd at the Suit of the Queen, and then he may plead Auterfoits Acquit: For there being a Record against him, that Record must be discharged: And it was compared to the Case where two Indictments are against a Person for one Fact, as one by the Coroner's Inquest, and the other by the Grand Jury, and he is arraigned, tried and acquitted upon one of them;

4

35. Sect. 2, 3, 4, 5, &c. Ld. Raym. 434, 556, 557, 1289, 1290. Cal. temp. W. 3. 20, 21, 109, 157, 158, 349, 374, 375, 642. Cal. temp. An. 216, 217, 228, 229, &c. 234. Stra. 855, 858.

yet he is not thereby discharged, but shall be arraigned de novo upon the other, to which he may plead the former Acquittal on the other; but now the Course is in the Old Bailey, and indeed most easy and fair, to try him upon both the Indiments at once.

Domina Regina versus Weekes.

Return of a
Rescous
quash'd for
Repugnancy.
Vide 2 Salk.
586.
Ante 141,
&c.
ib. 2 Hawk.
ch. 21. Sec. 4.

THE Sheriff returned a Rescous thus: First, Non est invent. in Ball. mea, and Executio Residui istius Brevis patet in Scheda huic Brevi annex', and that was of a Taking and Rescous, and the Return of the Rescous was quashed for the Repugnancy. For per Cur', After Non est invent. all the rest is idle, and there remains no more for the Sheriff to do. But note, upon the Return of Rescous, the Sheriff always concludes, that after the Rescous made, the Defendant Non est invent. in Balliva.

Domina Regina versus El. Franklin.

1 Salk. 317.
S. C.
Ld. Raym.
1038, 1039,
1179. S. C.
Vid. ib. 373,
380, 382.
Ante 128.
A Woman
indicted for
exercising the
Trade of a
Goldsmith,
not having
served seven
Years Ap-
prenticeship
to it.
4 Mod. 145,
146.
5 Mod. 425.
See Carthew
163.
Caf. temp.
W. 3. 30,
31, 117,
223, 251.
Caf. temp.
An. 165,
63.

SHE was indicted at the Quarter-Sessions of a Borough for exercising the Trade of a Goldsmith, not having served Seven Years Apprenticeship to it. And Eyre moved to quash it; for it appeared that it was a Year after the Offence committed.

But per Cur. upon View of 5 El. c. 4. Where a Bolety of the Penalty goes to the Informer, a Prosecution upon that Statute must be within a Year by the Informer; but where it is purely at Suit of the Queen, she has two Years; and where the Penalty is distributed as Bolety to the Queen and Bolety to the Informer, and no Prosecution within the Year, the Queen has another Year, and shall have all the Forfeiture.

2. Exception was, That the Quarter-Sessions of Boroughs ought not to receive such Indiments, but only those of the County at large: And for this he quoted the King *versus* Taylor, and another Case in 13 W. 3. where the Indiment was quashed upon that Exception.

But per Cur. The Contrary has been settled on Debate since, and there is no Danger of Oppression, because a Certiorari lies.

1 Salk. 370,
and 371.

3. Exception was to the Caption, and was this: Juratores, &c. super Sacramentum suum presentant existit. And this being Non-sense, the Indiment was quash'd for it.

1 Salk. 270,
380.

Note; per Cur. When one removes an Indiment by Certiorari, he ought to appear above the Term it comes in, or else he forfeits his Recognizance that he enters into for Trying of it; but such Appearance need not be in Person, but by his Clerk, and without it he cannot have a Copy of the Indiment to quash it.

Note

Note likewise, one cannot move to quash an Indictment for a fault in the Caption the same Term it comes in.

See 2 Hawk. Sect. 148 to 153.

Per Cur'. After Writ of Error brought, if the Record be not certified at the Return of it, upon Certificate thereof from the Officer of the Court in which the Writ of Error is returnable, the other may have a Writ de Executione Judicii of Course, and the Party cannot hinder Execution without a new Writ of Error.

Writ de Executione Judicii upon a Writ of Error brought.

Boisloe versus Baily.

1 Salk. 76. S. C.

Trespas for Assault, Battery and Wounding. Defendant as to the Vi & Armis pleads Not guilty, and quoad Residuum Transgr' pleads a Submission to an Award of all Controversies, and sets forth an Award made, viz. That the Defendant should provide two Fowls at his Mansion-house in Old-Bedlam in London, to be eat by the Plaintiff and his Friends on Wednesday or Thursday in such a Week, in Satisfaction of the said Trespass; and avers, that on Thursday in the said Week he did provide two Fowls at his Mansion-house aforesaid, &c. but that the Plaintiff nor his Friends did not come. To this it was replied, that Wednesday was the Day appointed for the Fowls, and traverse that it was Wednesday or Thursday. To this a Rejoinder and Demurrer; and it was urged, that the bare Award in this Case was not a good Bar without an Execution of it, because it was of a collateral Thing, of which the Plaintiff could not have an Action: And for this was quoted Keilw. 121. for an accord without a satisfactory Consideration cannot be good, and if we have no Remedy for what is awarded, it is in the Power of the Defendant whether he will satisfy us or not. 9 Ed. 19. a. 9 Co. 79. 17 Ed. 4. 8. a. that Accord, and Tender and Refusal, is not a good Bar; and the Reason is because an Action would not lie upon the Accord for the Plaintiff. 16 Ed. 4. 8, 9. 1 Roll. Abr. 128. Style 245.

Trespas for Assault and Battery. Award pleaded. See 2 Hawk. ch. 46. Sect. 44, &c. Carth. 159, 188. Skinner 679.

Obj. That this Award is a collateral Thing, &c. 1 Salk. 76.

2. Exception was, That the Trespass declared on was quare Vi & Armis, &c. and there was no Consideration or Submission of the Vi & Armis, and so this Award could not be a Bar to the Declaration.

2. No Consideration of the Vi & Armis.

3. That it being at the Election of the Defendant to provide the Fowls on Wednesday or Thursday, he ought to give the Plaintiff Notice on which of the Days he would provide them, and the Time of the Day on which he would have them ready; for otherwise, if the Plaintiff came on Wednesday to his House with his Friends, the Defendant might say he should not provide the Fowls till next Day, and if the Plaintiff did not come on Wednesday, the Defendant might say he provided them the Day before.

3. That Defendant ought to give Notice of the Day, and Time when, &c.

4. In this Case it was not enough to say, that he had provided the Fowls, but he should have tendered them, for the Words of the Award are, provide and give, &c.

4. He also should have tendered the Fowls.

5. No Venue
laid where
they were
provided.

5. There is no Venue laid where the Fowls were provided, only laid to be at the Defendant's House in Old Bedlam, London: And in London the Venue ought to be laid in the Ward, which is like a Hundred, or in a Parish at least, which is in the Nature of a Vill in another County.

Vi. Sir Tho.
Jones 6, 158.
If Award of
collateral
Matter in Sa-
tisfaction of
Damages be
a good Plea
in Bar, with-
out alledging
Performance.
Ld. Raym.
123, 246,
247, 248,
612, 898,
964, 1039.
Caf. temp.
W. 3. 588,
589, 635.
Fitz. G. 54,
168, 169,
270, 271.
3 Wms. 190.
See Carthew
108.

To the first it was answered by Serjeant Hall, That indeed old Books did hold, that an Award of a collateral Matter, in Satisfaction of Damages, was not a good Plea in Bar without alledging Performance; because, as was then held, no Remedy lay upon the Award: But that Reason fails; for tho' it be true that no Remedy lies upon the Award it self for it, yet an Assumpsit lies upon the Submission, which is a Promise of Performance. And to that Opinion Chief Justice Holt did very strongly incline; for he said, It had been often held of late Days, that the Submission mutual was an actual mutual Promise of Performance; and if this had been upon a Bond, awarding a collateral Matter had been a good Award, because the Party has Remedy upon the Bond of Submission; and if there be Remedy for the Thing awarded, it needed not be averr'd executed, and if so, the Fourth Objection, viz. the Want of pleading of Tender, falls to the Ground. As to the not submitting the Vi & Armis, it concerns the Queen, and cannot be submitted by the Parties. As to the third Objection, it was answered, that the giving of Notice was not necessary, for the Defendant by the Award had the Advantage of an Election given him: And to the Fifth, that the not laying of a Venue was helped by Verdict.

The Want of
a Venue how
curable.
Comyns 555.
Ld. Raym.
331, 184,
258, 344.
Court advised
them to com-
promise the
Matter.

To which Holt, Ch. J. said, The Want of a Venue is only curable by such Plea as admits the Fact for the which it was necessary to lay a Venue; as if Debt be upon a Bond, and no Venue laid where the Bond was made, if Demurrer be to it, it will be ill; but if the Defendant plead a Release whereby the Bond is admitted, that helps the Declaration. But in this Case, by reason of the Frivolousness of the Action, the Court gave no Judgment, but wish'd them to compromise the Matter.

Caf. temp.
W. 3. 398.
Caf. temp.
Mac. 383.
1 Mod. Caf. in
L. & Eq. 345.
1 Wms. (645.)
2 Barnes 59.
Stra. 900.
Mean Profits,
Venue in
Ejectment.
Ante 130.
Post 309.

Per Cur'. If one pretending Title to the Land give Security to the Tenants to save them harmless upon paying him the Rent, and after another recover in Ejectment against them, they have not yet a Remedy upon the Security till Recovery of the mean Profits, which is from the Time of the Action brought, and without an actual Entry there can be no Recovery of the Profits.

Per Cur'. If a Man sign a Lease in one County or Vill of Lands in another, yet the Jury must come from the Place where the Land lies in an Ejectment upon such Lease.

Vide 1 Salk.
273.
2 Salk. 645,
646, 647.
Ante 22.
Post 242.

Per Cur'. A new Trial is never granted for Want of Evidence whereof the Party was apprised, and which he might have at the Trial.

Per

Per Cur'. If one levy Part of his Debt by Fi. fa. he cannot after take out a Capias for the whole, but his Way is to return Fi. fa', by which it may appear how much is levied, and then take a Ca. Sa. for the Residue.

Per Cur'. No Tithe due for Fish of common Right, but it may be by Custom. (No Wood is Tithable of Common Right, but only by Custom.) See Carth. 303, 379. See also Skinner 51, 239, 341, 356, 560, &c. 2 Vern. 46. Cal. temp. W. 3. 47, 524.

Tithe Fish.
1 Cro. 329.
1 Vent. 5.
1 Keb. 454.
2 Keb. 2,
447.

In Replevin, the Avowant said, That he was possess'd for Years, and made an Under-lease, reserving Rent, &c. for which Arrear he distrained. The Plaintiff is nonsuited, and Return irreplevisable awarded; and upon the Return of the Writ of Inquiry, the Exception taken is that the Avowry was naught, for that the Avowant pleaded a particular Estate; without shewing who had the Fee, and the Commencement of the particular Estate; but tho' that were bad, yet being after the Nonsuit, it was too late; for the interlocutory Judgment is such on which a Writ of Error lies, as in Judgment on Writ of Dower.

Upon an Avowry in Replevin. Obj. That he pleaded a particular Estate without shewing who had the Fee. Vide ante 158.
5 Mod. 150.
Ld. Raym. 334, 923,
1 Mod.

1230. Cal. temp. W. 3. 188, 190, 191. Cal. temp. An. 3. 179, 220, 221. Cal. temp. Mac. 25. 1 Mod. Cal. in L. & Eq. 52, 53, 54. Comyns 247. Stra. 796.

Stanyon *versus* Davis.

ERROR of a Judgment in the Marshal's Court, wherein the Plaintiff did declare, that at such a Day, in such a Parish in Com. Midd' he did deliver into the Stable of Defendant (thus, præd' D. com' Hospitat' adtunc & ibidem existen' in Stabulum deliberavit) a certain Gelding, to be by him safely kept at a reasonable Rate, and to be safely re-delivered by him to the Plaintiff; that the Defendant adtunc ibidem tam negligenter the said Gelding did keep, that through his Defect it was taken out of his Inn, and so immoderately rid and whipped, that he was quite spoiled. Verdict and Damages for the Plaintiff, and Judgment for him below. And now upon the Writ of Error, Raymond and Cheshire, at several Times, excepted:

1 Salk. 404.
S. C.
Ld. Raym. 795. S. C.
Error of Judgment in the Marshal's Court, &c.
Post 227.
See Danv. Abr. Tit. Errar, post 303.
Stra. 556.

1. That the Horse for ought appears was put into the Defendant's Stable without his Privy, and if so, he was not bound to take any Care of it; for as the Declaration is worded, it is to be understood that it was delivered into his Stable, he being a common Inn-keeper, for præd' D. com. Hospitat' existen' must be taken in the Ablative Case: But the Words being indifferent to an Ablative or Dative, and taking them in a Dative maketh the Declaration good, and the other bad; per Powell, Powys & Gould, absente Holt, It shall be taken in that which makes it good.

Words indifferent shall be taken in that Case which makes the Declaration good.

2. Objection was, That no Place was laid where the immoderate Riding was, nor that it was within the Jurisdiction of the inferior Court: And it was laid down for a Rule, and agreed unto by the Court, That whatever is essentially necessary to maintain an Action, if the Action be brought in an inferior Court, that Matter must be averr'd to have been within their Jurisdiction, otherwise they have no

Rule of Averment upon Action in an inferior Court, to shew it to be within their Jurisdiction. Ante 3. Post 306.

Jurisdiction;

4

Ld. Raym. 211, 216, 230, 346, 348, 1040, 1310, 1543, 1555. Cal. temp. W. 3. 598. 1 Mod. Cal. in L. & Eq. 4, 77, 172, 173. Fitz-G. 314. Comyns 574, 153. Stra. 827.

For particular Jurisdictions are not to be supported by Intendment.

Raym. 75.
1 Lev. 50,
69, 96, 105,
137.

Jurisdiction; for whatever is not averr'd to be within their Jurisdiction, shall be intended out of it. Vid. 1 Saund. 73. It was also agreed clearly, that if that which is the Gift of the Action, and the compleat Cause of it, be laid within the Jurisdiction, and the Declaration shews further Matter, which is only Aggravation or consequential Damage without which the Action would have lain, such Matter need not be averr'd to be within the Jurisdiction; as in Case for calling a Woman a Whore, whereby she lost a Marriage, there not only the Words, but also the Loss of Marriage, must be alledged to be within the Jurisdiction, because the one without the other would not maintain the Action; and there one may confess the Words, and traverse the Damage. So in Trespas by Batter for the Battery of his Servant, whereby he lost his Service, the Loss of Service, as well as the Battery, must be laid within the Jurisdiction. But in an Action by a Tradesman for calling him a Cheat in his Trade, whereby he lost his Customers, there the Loss of Customers need not be alledged within the Jurisdiction, because the Words are actionable without it, and it is only Aggravation. 1 Cro. 570. 1 Ro. Ab. 546. 1 Jo. 448. Action for arresting one in another Man's Name, without Consent of the other, per Quod his Creditors came all and arrested him. It is not needful to alledge that the Creditors came upon him within the Jurisdiction, because the Arresting in another's Name, without the other's Consent, is in it self actionable. Then the Doubt was, Whether the Defendant's Neglect, in suffering the Gelding to go out of his Custody, was a compleat Cause of Action, without any Regard to the Riding, &c.

The sole Cause of Action was not keeping the Gelding safely.

And Ward urged, That the sole Cause of Action was the not keeping the Gelding safely, according to the Contract, and for this quoted the Register 106. Rast. Ent. 3. and then it being a Nonfeasance, no Venue need be where the Nonfeasance was. Vid. 1 And. 139. and Walker *versus* Ashwood, Mich. 10 W. 3. in B. R. And in Pasch. ult' upon Argument of this Case, Holt, Ch. J. ask'd the Counsel for the Plaintiff in Error, If the original Declaration had been in this Court, whether they would venture to demur to it for not shewing the Place the Horse was immoderately rid in? And he said, sure they would not. And then if this were a good Declaration in a superior Court without that, then it will not be necessary to aver it within the Jurisdiction of an inferior Court in an Action brought there. To which it was answered by Cheshire, that the Inference did not follow; for if Indebit' assumpsit be in a superior Court for Goods sold and delivered, though no Place be laid where the Sale or Delivery was, yet it is no Cause of Demurrer, but the not alledging it to be within the Jurisdiction of an inferior Court would be fatal. Vide Simile, 37 H. 6. 2, 4.

Judgment affirm'd.
Cas. temp.
W. 3. 480,
483.

But per tot. Cur. The Judgment was affirm'd, for the Neglect of not keeping according to the Contract is the sole Gift of the Action; for if the Declaration had been, that the Defendant did so negligently keep the Horse, that he was taken out of his Stable, and rid into

Somer-

Somer setshire to his Damage, &c. the Action would lie: Or that he so negligently kept him, that thro' his Neglect he was beat or abused, or wanted reasonable Provender in his Inn. And the sole Cause of Action is his Neglect of due Care of him. Jud. Affirm'.

Note; The Chief Justice remember'd the Case of Mayo and Combe in my Lord Hale's Time, where the Counterpart of an ancient Deed was admitted in Evidence, and a special Verdict being found in the Case, finding the original Deed, it concluded prout per le Counterpart it did appear: And this was so done to preserve the Precedent.

Q. 3 Keb. 477.
Hard. 119.
1 Lev. 25.
Counterpart of an ancient Deed lost, &c. admitted for Evidence.
Vid. post 248.
Ld. Raym. 154, 746, 1292, 1371.
2 Vern. 471, 591, 603.
Preced. Chan. 59, 64, 116.
Caf. temp. Mac. 8.
Stra. 526, 1122.

And now all the Court held, that the Counterpart of an ancient Deed which might be lost, was good Evidence with other Circumstances, but not of it self without other Circumstances; but that a Counterpart of a Deed leading the Uses of a Fine was of it self good Evidence. See also Carthew 79, 80, 142, 181, 220, 225, 265, 346, and Skinner 15, 24, 82, 174, 205, 431, 579, 584, 623, 624, 639, 640, 672, 673.

Fox *versus* Tilly.

Quære 2 Salk. 653.
Bond may be given to save Warden, &c. harmless against past Escapes, but not against future.
Vide 2 Salk. 438.
Caf. temp. Ann. 93.

DEBT upon a Bond conditioned to save the Plaintiff harmless against all Escapes, which he had suffered as Warden of the Fleet Prison, and on Demurrer to the Rejoinder, which was in it self a Departure from the Plea, which was a Non suit damnificatus, and a special Damage replied, and Continuance given to the first Day of this Term: The Court took a Diversity between a Bond to save harmless against future Escapes, for that would be void, and a Bond to save harmless against past Escapes; for tho' it were unlawful to suffer them, yet one may contract to indemnify one against a Penalty already incurred against a Law. And note, here the Court was informed that the Plaintiff was dead, and therefore they ought not to go to Judgment. To which they answered, If that were so, the Defendant must come and plead it as a Plea puis Darrein Continuance, and make Oath of the Truth of it, otherwise they would not take Notice of it, and if the Plaintiff were alive on the Continuance-Day, they might well give Judgment; and accordingly the Plaintiff had Judgment. For, per Cur', if he dies before the first Day of Term, we cannot take Notice of it without it be pleaded as puis Darrein Continuance; and if he were alive the first Day of Term, the Judgment shall relate to that Day.

Inst. Leg. 604.

Linch *versus* Hooke.

1 Salk. 7. S. C. Post 311.

PER Cur', If A. give Bond by Name of B. and he is sued by Name of B. he may plead Misnomer, and the other must plead that he made the Bond by the Name of B. and estop him by demanding Judgment; if against his Deed, he ought to be admitted to say his Name is A. and then the Defendant may rejoin, and say that he made no such Deed, and this the Defendant must do without Oyer; for if he pray Oyer; he admits his Name to be B. Vide ante 28.

Where A. makes a Bond in the Name of B. how to sue &c.

Irregular to
proceed on
Bail Bond till
Essoin-day of
next Term.
Ld. Raym.
721.
Cas. temp. An.
2, 170, 253.

Ld. Raym.
854, 1253.
S. C.
1 Salk. 40. S. C.
2 Salk. 601,
679.
Post 256.
Ant. 134, 199.
Upon a Sci'
fac' against
Tertenants,
they all ap-
pear, &c.

1 Keb. 351,
388.
2 Keb. 55, 728.
3 Keb. 25, 50.
3 Lev. 205.
That such a
joint Plea is
bad.

This is plead-
ing a Non-ten-
ure by Im-
plication.

When a special
Non-tenure
may be plead-
ed.

2 Saund. 23.
2 Keb. 587,
636, &c.
1 Sid. 436.
1 Mod. 28.

If a Writ be returnable in one Term, the Defendant ought to put in Bail in that Term, (that is) at any Time before the Essoin-day of the next Term, and till then it is irregular to proceed upon the Bail-Bond; but one in the mean Time may take an Assignment upon it, and take out a Warrant.

Adams *versus* Tertenants of Savage. Vid. ante 134, 199.

The Case being moved again this Term, it appeared on the Record to be thus: A Sci' fac' by Administrator upon a Judgment by his Intestate, to warn in the Tenants of such Lands as were Savage's at the Time of the Judgment, &c. The Sheriff returns several Tertenants, among others J. and S. his Wife, Tenants of a capital Messuage called B. and also of the Manor of B. All the Tenants appear, and plead in Abatement jointly, viz. That one G. T. is Tenant of the Freehold of the Manor of B. and so pray Judgment of the Writ, & quod cassetur.

And per Cur', The Plea is clearly bad:

1. For them all to join in the Plea, when they are returned several Tertenants; for if A. be returned Tertenant of one Parcel, and B. of another, A. cannot plead that another is Tertenant of another Parcel, and not returned, but as far as it affects himself, not quatenus it affects B.

2. This, as the Record is, is pleading a Non-tenure by Implication; for if G. T. be Tenant of the Freehold of the Manor of B. of which J. and S. his Wife are Tenants returned, that is an Implication that J. and S. are not Tenants of it, and therefore bad; for a Non-tenure, tho' it were expressly pleaded, is not a good Plea to a Sci' Fac' upon a Judgment in a personal Action, because it is directly to falsify the Return of the Sheriff: It has been a Question, Whether a special Non-tenure could be pleaded in that Case? But that it may, is now settled. Vi. 3 Cro. 872. 8 Ed. 4. 19. 9 H. 5. 11. But in Sci. fac' to have Execution of a Judgment in a real Action, one may plead Non-tenure against the Return of the Sheriff, because there the Freehold so much favoured in Law, is at Stake: Besides, as to the Pleading of this in Abatement, if the Sheriff has returned all the Tertenants in his County, it is altogether improper to plead it in Abatement, that there are other Tenants in another County not returned; because, in that Case, there are none to be summoned by that Sheriff: And the Sheriff having returned all in his County, has done his Duty; but if it be pleaded, that there are other Tenants in the same County, the regular and neat Way is to conclude, by demanding Judgment, if they ought to be put to answer quousque the other be summoned; for which see the Precedent in 2 Saund. Jefferson and Dawson's Case; but it is true, that Precedents are both Ways, but Judgment is never according to the Conclusion here, quod breve cassetur; but only to stay quousque; for Judgment shall not be to abate a Writ but where the Plaintiff may have a better.

And Holt, Ch. J. quoted Kemp v. Laurence, Owen 134. where it was held, That a Tenant for Years is a good Tenant to plead in Bar to a Sci' fac' on a Judgment for Debt or Damages, because that is only in the Personalty; Secus to a Judgment in the Realty. If one Jointenant be returned, he may plead that another is Tenant of a Society.

Where a Tenant for Years may plead in Bar to a Sci' fac' on a Judgment, &c.

Et per Cur', Respond' ouster.

Fitz-Hugh *versus* Dennington.

Post 259, S.C.
Ld. Raym.
1094.

ERROR of a Judgment in the Marshal's Court in Debt upon a Bond, where the Defendant upon Oyer of the Condition, which recited, That the Plaintiff was become an Apprentice to the Defendant for seven Years; and then the Condition was, That if the Defendant at the End of the said seven Years, should make, procure, or cause the Plaintiff to be made free of the Company of Joiners of London, if thereunto requested, then the Obligation to be void. To this the Defendant pleaded, That ad Finem of the said seven Years, or after, till Time of Action brought, he was not requested. To which the Plaintiff demurs, and Judgment for the Plaintiff below: Supposing the Request not material at all, or at least if it were, the Plea should have been, [that he never was requested] and not to tie it up to a Request at the End of the seven Years, or after; for he might have requested before the End of the seven Years, to make him free at the End of the seven Years.

Error of a Judgment in the Marshal's Court, upon Condition of a Bond to make the Plaintiff a Freeman of London, &c. on Request. Vid. ante 225. Post 259, 260. 1 Lev. 85.

But Mountague, for reversing the Judgment, insisted, That if in this Case the Request had not been expressly made Part of the Condition, yet the Plea had not been good; and took a Diversity, When there is a Duty made by the Bond, then there need no Averment of a Request; otherwise when the Bond is for doing a collateral Act as here; and for this, he quoted 1 Brownl. 13. But whenever the Condition is to do a Thing when thereunto required, or if thereunto required, there the Request is Part of the Condition, and to be averred.

Diversity upon a Condition, when it is a Duty, and where to do a collateral Act.

And per Cur', The Request is material here, and the Meaning is plain from the Recital, that the Defendant was to have made the Plaintiff free at the End of seven Years, that is, when his Time was out, if the Plaintiff pleased, which was to be signified to the Defendant by Request; and the Request must be when the Condition could be performed, viz. at the End of seven Years, and not before; and if it were a good Request within the seven Years, that ought to be shewn of the Plaintiff's Side, otherwise it shall not be intended; for it cannot be intended one would request a Thing to be done, before it was to be, or could be done.

That the Request is material here, &c.

And Judgment reversed Nisi. Vide Post 260, 261.

Judgment reversed Nisi.
Robert

Ld. Raym.
1043. S. C.

Debt upon a
Bond made
(dated, sealed
and delivered)
at Port St.
David's, &c.

Ld. Raym.
1212, 1214.
Caf. temp. W.
3. 568.
Caf. temp.

Ann. 51. Caf. temp. Mac. 255. Stra. 614, 646, 775.

Robert *versus* Harnage.

Plaintiff declares, That the Defendant became bound to him at Port St. David's in the East-Indies, apud London, in a Bond of — for the Payment of — to him, his Attorney or Assigns: Upon Oyer, the Bond appearing to bear Date at Port St. David's in the East-Indies; and the Solvendum was to the Plaintiff's Attorney or Assigns, without mention of himself: And on Demurrer to the Declaration, two Exceptions were taken:

After Oyer,
Defendant de-
murred, and
Exception of
Variance ta-
ken, &c.
Cro. El. 256.
Hob. 171.

1. That the Bond declared on, and that set out on the Oyer, were variant; the one being Solvendum to him, his Attorney or Assigns, the other to Attorney or Assign.

To which it was answered, That the Declaration must not be according to the Letter of the Obligation, but according to the Operation of the Law thereupon: As if A. bind himself in a Sum to B. Solvendum to C. who is a Stranger, a Payment to C. is a Payment to B. and in an Action upon it, the Count must be upon a Bond Solvend' to B. Vid. 4 Ed. 4. 19. 2 Keb. 81. 1 Sid. 295. And per Cur', If A. make Bond to B. Solvend' to such Person as he shall appoint; if B. does appoint one, Payment to him is a Payment to B. and if B. appoint none, it shall be paid to B. himself.

2d Exception,
That the Date,
&c. made it
local, &c.
Ante 194.

2. Exception was, That the Bond set forth, appeared to have been sealed and delivered at Port St. David's in the East-Indies, and therefore the Date made it local; and by Consequence, the Declaration ought to have been of a Bond made at Port St. David's in the East-Indies, apud Islington in Com' Middlesex, or on such a Ward or Parish in London, &c. as upon a Bond, apud Bourdeaux in France, in Islington: And of that Opinion was the Court.

2 Salk. 572.
S. C.

Peat's Case.

Post 301.
A dissenting
Preacher qua-
lified in one
County, re-
moves to ano-
ther, &c.

He was a Preacher to a Meeting of Dissenters; and having qualified himself as such, according to the Act of Toleration, in one County, removed from thence into another County, and set up a Conventicle there, without any farther Qualification; whereupon a Justice of Peace convicted him upon the Statute of Conventicles. And now the Attorney General, in his Behalf, moved for an Attachment against the Justice for a Contempt of the Act of Toleration; alledging, That a Qualification in one County, is a Qualification all over England.

Vide 2 Salk.
673.
The Justices
are Judges, and
are only to ac-
quit such as
comply with
the Act of To-
leration, &c.

But per Cur', The Act of Conventicles is still in force, and the Justices of Peace have Power of executing it against such as do not qualify themselves according to the Act of Toleration, which Act only enjoins the Justices of Peace to acquit such as do comply with the Act of Toleration: So they being Judges of the Matter, if they

wrong

wrong you, you have your Remedy by Certiorari, or appeal to the Sessions, where the whole Fact may be heard and examined over again; which Examination of the Fact shall be final by the very Words of the Statute; and if they err in a Matter of which the Law makes them Judges, it would be most unreasonable to grant an Attachment for such Error. Then the Attorney moved for a Mandamus to the Justices, to suffer him to preach there, he qualifying himself according to the Act of Toleration. But the Court denied it, for a Mandamus is always to do some Act in Execution of Law; but this would be in the Nature of a Writ de non Molestando, and that contrary to a Conviction standing against you, which shall be looked upon as legal while it stands. Then they moved for a Mandamus for the Justices to take Security from him not to become chargeable to the Parish; which was also denied; for that Matter is only to be upon Complaint of Churchwardens, and Overseers of the Poor: And they held, That by the Act of Toleration, it sufficeth not that the Licence of such Preacher be inrolled at the Quarter-Sessions of one County, to enable him to preach in any other County; but it ought to be at such Quarter-Sessions as would otherwise have Conusance of the Matter upon the Statute of Conventicles, and that is the Sessions of the County where the Fact is committed; and at last they moved for a Mandamus to the Sessions to state the Fact specially; but it was denied, for that the Statute excludes all others from examining the Fact: And finally, they moved for a Procedendo to a Certiorari already brought by them, in order to appeal to the Sessions, which was granted.

Then Attor' Gen' moved for a Mandamus to suffer him to preach, &c.

Then a Motion for a Mandamus for the Justices to take Security, &c.

Per Cur', The ancient Rule was, That a Bail-Bond could not be put in Suit till a Rule obtained to amerce the Sheriff, for not having the Body forth-coming: And now Proceedings upon the Bail-Bond were set aside, because there was no Cepi Corpus returned.

Proceedings on Bail-Bond set aside, because no Cepi Corpus returned.

Brewster *versus* Weld.

SCI' fac' out of Chancery, returnable in the Queen's Bench, to repeal Letters Patents of the Rectory of Algate: And it was moved for, that the Sheriff might return his Writ: And here it was resolved, That if Letters Patents be to the Prejudice of another, he may have a Sci' fac' upon the Inrolment thereof in Chancery to have them repealed, as well as the Queen may; as if a Fair be granted to the Damage of mine, I may have a Sci' fac' to repeal such Grant: And they seemed likewise to hold, That a Sci' fac' upon a Record in Chancery, was not returnable here; but clearly after a Writ issues out of Chancery returnable in another Court, that Court into which it is returnable has Jurisdiction of it, and not the Chancery, nor can the Chancery supersede such Writ; but all the Irregularity both in issuing it out, and in the Return of it, is solely examinable in the Court in which the Writ is returnable; which if the Writ be legal, will hold Plea upon it, otherwise will quash it: But the Motion

Vid. 2 Vent.

244.

3 Lev. 221.

2 Keb. 373.

S. C. cited

Ld. Raym.

1060.

Sci' fac' out

of Chancery

into B. R. to

repeal Letters

Patents moved

&c.

2 Vent. 344.

3 Lev. 220.

Vide Bro. Sci'

fac' 104. acc.

tion being the quarto Die post, all which Day the Sheriff has to return the Writ, the Court would not make a Rule; and the same Motion being made the next Day, the Court was informed, that the Chancery had superseded the Writ; whereupon, in some Heat, they ruled the Sheriff to return it, or to return the Superseatas, if he depended on it, that it would excuse him: The Day after, the Sheriff having got the Writ back from the Chancery, returned it Sci' fec', and brought it into Court.

Upon *Non assumpsit*, &c. a Feme may give Coverture in Evidence. *Caf. temp. W. 3. 609.* Feme Covert may plead *Non assumpsit*, and give Coverture in Evidence, because Coverture makes it no Promise; so she may plead *Non est factum* to a Bond, and give Coverture in Evidence. Ray 395. Vide ante 218.

Cockroft *versus* Smith.

Post 263. S.C. In Trespass, &c. with special *Acetiam*, the Defendant being poor not held to Bail. Vide 1 Mod. 2 Acc. THE Defendant in a Scuffle bit off the Fore-finger of an Attorney's Right-hand; and in Trespass, with a special *Acetiam* by a Judge's Warrant, the Question was, Whether the Bail should not justify themselves to a Sum suitable to the *Acetiam*? Vide post 266. And per Cur', he was not held to that, he being very poor.

Gibbon *versus* Dove.

Time to except against Bail put in upon a Writ of Error, &c. *Caf. temp. W. 3. 319.* UPON Writ Error, and Bail put in, the Defendant has twenty Days to except against the Bail, which Exception ought to be entered in the Clerk of the Error's Book: He ought further to take out a Rule to serve upon the Attorney, or Agent of the Plaintiff, to put in better Bail, but that Rule need not be served within the twenty Days; but it must be before Execution sued out for Want of Bail, per Cur', & omnes Clericos.

Notice of the Exception. Note; It was said, there ought to be Notice of the Exception within twenty Days.

Jacob *versus* Dallo.

S.C. Faresl. 8. 2 Salk. 551. 5 Mod. 436. Ld. Raym. 755. S. C. Prohibition to Spiritual Court, to stay Suit about disposing Pews, &c. V. 1 Keb. 457. *Caf. temp. W. 3. 401. Ld. Raym. 856, 1205, 1507. 1 Wms. 774.* Prohibition was moved for to the Spiritual Court, to stay a Suit there about the Right of disposing of Pews in a Church: The Suggestion was, That such a Corporation were Impropriators of it, and Time, &c. used to repair all the Pews, and ratione inde had the Disposal of them; but because it did not appear to the Court, whether it were Presentative or Donative, or with Cure of Souls or not, they would do nothing in it. But they said, a Donative might be with Cure of Souls, as the Tower of London's Chapel: And that there are also another Kind of Churches, which are neither Presentative or Donative, but Stipendiary, and yet have Cure of Souls: As if there be an Impropriation, and it has no Vicarage, but only a certain Stipend is given yearly to him that serves the Cure; and that is merely Dative, and that at Pleasure of the Impropriator.

Note;

Note likewise it was said, Anciently there were no Pews in Churches, but only Forms; and that it had been a good Prescription to say, That Time out of Mind the Corporation did repair such an Isle of the Church, *ratione cujus* the Mayor and Aldermen sat there; for tho' the Right be in the whole Body, the Enjoyment may be and enure to a select Number.

Per Cur', The Bail have their Principal always upon a String, and may pull the String whenever they please, and render him in their own Discharge; they may take him up even upon a Sunday, and confine him till the next Day, and then render him; for the Entry in this Court is *traditur in Ballium*, &c. and the Doing it on a Sunday is no Service of Process, but rather like the Case where a Sheriff arrests by Virtue of a Process of Court on Saturday, and Party escapes, he may take him on Sunday, for that is only a Continuance of the former Imprisonment.

*Vide Repertorium Canon-
icum, Tit. Pews
and Seats.*

*Vide Faresi.
77, 85, 98.
Bail may ren-
der the Princi-
pal when they
please, and take
him up upon a
Sunday, &c.
So may a She-
riff take an
Escaper.
Cal. temp. W.
3. 275, 348,
606, 607, 667.*

Knight *versus* Burton.

*1 Salk. 75.
S.C.*

DEBT upon Bond conditioned for Performance of an Award; which was set forth, and a Breach assigned: And upon Demurrer, Parker took Exception:

*Debt upon a
Bond condi-
tioned for Per-
formance of an
Award, &c.
Post 244.*

1. That the Award recited, That the Parties were Jointenants of such Land, and ordered they should make Partition by mutual Conveyances, which was said to be incertain, and not making an End of the Matter by shewing what Moiety, or Part, the one should have, and what the other: To which it was answered, and resolved, That it was well enough; for whereas they were Jointenants before, they would now become Tenants in Common.

*1. Upon a
Partition a-
warded, and
not shewed
how; *sed non
allocatur.*
Ld. Raym.
234, 247,
612, 964, 898.*

2. It was objected, That could not be; for it was further awarded, the one should have *unam dimidiam Partem sive medietatem*; which shews they intended somewhat more than a Tenancy in Common, but left it incertain; for *Dimidia Pars* is a Moiety in Certainty, and *Medietas* is a Moiety incertain; and in this very Award, they in other Matters used *Medietas* for a Moiety in Certainty, as *Medietas* of the Profits of such a Ship to be delivered, which is to be understood of a Moiety divided; for otherwise it could not be delivered. But per Cur', *Dimidia Pars*, or *Medietas*, shall be respectively taken for Moiety divided or undivided, *secundum Subjectam materiam*; as *Medietas* of a Thing to be delivered, shall be understood a divided Moiety, because it cannot be delivered except it be divided; so *Dimidia Pars*, if it be such a Thing as cannot be reduced to a divided Moiety, shall be understood a Moiety undivided; as in Dower, a Woman demands *tertiam Partem* if it be of such a Thing as is capable of having a third Part divided made of it, it shall be so; but if it be of 3d Part of Lands of Tenant in Common, Mill, &c. it must be a third Part undivided.

*2. How *dimi-
dia Pars*, or
Medietas, shall
be respectively
taken.*

3d Objection,

3. Whereas so much Money had been disbursed (as is alledged) and well, &c. Ante 229. Skinner 156, 159, 188.

3d Objection, That they awarded Money to be paid, which of their own shewing upon the face of the Award did not appear to be due; for it was, Whereas so much Money has been disbursed by the one Party, as is alledged: So tho' if they had said, Whereas so much Money has been disbursed, it would be intended it appeared to them to have been so; yet when they go farther, and say, as it is alledged, that takes away such Intendment; for they shew their Certainty of it was only because it was alledged, which might be without any Proof, or alledged by any Person whatever: But it was resolved, that alledged should be understood as alledged, and not controverted or disproved by the other Side.

4. That a Suit in Chancery between the Parties should be dismissed, &c. V. 1 Salk. 75.

4th Objection, That it was awarded, that a Suit between the Parties in Chancery should be dismissed; which, as was urged, was ill, for that an Award ought to be final, and that a Suit in Chancery might be dismissed upon Payment of Costs, so as the Party might begin again: Indeed, if the Dismissing be absolute, it is final; but if it be dismissed, as is frequently done there, without Prejudice, the Party may begin again, and therefore an Award of dismissing a Suit in Chancery is uncertain, and not final, but is like the Awarding that one of the Parties in a Suit at Law be nonsuited, which is void. But per Cur', It is true, awarding that one of the Parties be nonsuit, is void, for that is not final; but when an Award is, that a Suit commenced be dismissed, that must be understood that it shall be dismissed, and cease forever, that is a substantial Dismission and Cesser, and not the Shadow of one; as if the Condition of a Bond be to deliver up another Bond by such a Day to be cancelled, and the Oblige before the Day puts the first Bond in Suit, and obtains Judgment thereupon, and at the Day tenders it to be cancelled, according to the Letter of the Condition of the second Obligation, yet his Obligation is forfeited; and dismissing here is put in Latin dimittere, with an Anglice to discharge, and to discharge a Suit is to release it, and ideo final: And if an Action be depending upon a Bond, and puis darrein Continuance the Plaintiff does release the Action, that releases the Duty. Besides this Award is, that what is awarded of the other Side, should be in full of all Debts and Demands then due and owing; and the Word Demands extends to all Things that the one Party has Right to demand or exact of the other, at the Time of Submission; and the Words, due and owing, does not qualify or restrain it to a Debt, or other special Demand, that is more strictly speaking a Duty; for whatever a Man has a Right to demand of another, may well be said to be due and owing from the other to him; so it may extend to Right of Entry into Land, to a Suit for Partition, &c.

The Extent of the Word [Demands] in an Award, &c.

A stated Rule in Awards, that are said to be de & sup' Præmissis. Post 244. 1 Salk. 70. Caf. temp. W. 3. 116, 117. 1 Mod. Caf. in L. & Eq. 212, 213. Comyns 183, 547.

Note; This was agreed to be a stated Rule in Awards, that are said to be de & sup' Præmissis; that if the Words used in them be in their own Nature more comprehensive, and so extensive to Things not within the Submission, yet they shall be intended that there was no other Matter between the Parties for them to lay hold on, but what was submitted if the contrary be not shewn: So e converso, if the Words are more narrow, and less comprehensive than to take in all the Mat-

ter

ter of Submission; yet it shall be intended that no more was in Controversy than what the Words naturally comprehend, if the contrary be not likewise shewn.

Et Jud' pro Quer' Nisi, per tot' Cur'.

Judic' pro
Quer' Nisi.

Selby *versus* Greene.

THE Obligee made a material Razure in the Condition of a Bond, and after brought an Action upon the Bond, and the Defendant having had Oyer, and the Bond being now in Court, and the Razure discovered, the Defendant pleads Non est Factum, and Notice of Trial given; but when the Plaintiff understood that the Defendant had found out the Cheat, and could prove it, he countermands the Notice.

Obligee had made a material Razure in Condition of a Bond, &c.

Vide 2 Bullst.

247, 248.

11 Co. 28.

5 Co. 23.

Dyer 261,

262.

2 Roll. 30.

Cro. El. 546.

Motion, that

the Bond

should re-

main in Of-

ficer's Custody, &c.

And now Serjeant Darnell moved upon Affidavits of this Matter, That the Bond should remain in the Custody of the Officer of the Court till the Cause were tried; for otherwise the Plaintiff would stay until the Defendant's Witnesses were dead, and put this forged Bond in Suit against them, when he could by no Possibility relieve himself against it; and now if he would try it by Proviso, the Plaintiff would be nonsuited, and might begin again.

Per Cur', If you had denied the Deed according to Weymark's Case, it is to remain in Court till the Cause be tried; secus it shall only remain for the Term in which it is brought in; but the most it goes to is, that upon Imparance granted, it should remain in Court till the Defendant pleads: As here, if it be by Bill, the Defendant after Imparance may crave Oyer; and therefore there it must remain in Court till the Party is put to plead, that he may in that Case have Oyer of it.

Allowed, if they had denied it according to Weymark's Case, &c.

2 Salk. 497.

Vide post

303.

Cal. temp.

Mac. 41.

Jenk. 70.

1 Sid. 131,

170.

Salk. 215.

1 Vern. 66.

And the Ch. Just. remember'd Sir Solomon Swale's Case in his time; where a Deed upon Evidence was found not to be the Defendant's Deed, and by Consequence forged; and it was insisted on, that the Court ought to cancel it: Yet the Court denied it, because there might be Error in the Proceedings for which the Verdict might be set aside, and then the Bond would stand unimpeach'd, and so the Matter be brought in Question again: And so it was resolved it should not be cancelled, but remain in Court uncanceled: And they said, here the Defendant's best Way would be to carry the Cause down by Proviso; and if the Plaintiff would suffer himself to be nonsuited, whereby the Suit will be at an End, and the Plaintiff entitled to take his Bond out of Court, yet that Nonsuit would be great Evidence against him in another Action to be brought thereupon; or else he might get his Witnesses Testimony perpetuated in Chancery.

Court said Defendant might carry it down by Proviso, &c.

O o o

But

Defendant's
Counsel said,
he might
bring Action
upon his
Case, &c.

But Darnell said, he might bring an Action upon his Case against the Plaintiff for suing him upon a forged Bond, and that a Verdict therein would be Evidence for him, it being between the same Parties.

And so he took nothing by his Motion.

Ante 38. S. C.
2 Salk. 466,
468.

Godolphin *versus* Tudor.

Pasch. 3 Annæ, in B. R.

Debt upon
Bond condi-
tioned for
Performance
of Articles,
&c.
Vide post
237.

Stat. 5 & 6 Ed.
6. c. 16.
Vide 3 Inst.
148.
Hob. 75.
Co. Lit. 234.
3 Keb. 552,
659, 678.
Cro. Car. 361.
Cro. Jac. 269,
386.
Ld. Raym.
1245.
1 Vern. 98,
99.
Preced. Chan.
199.
Cas. temp.
W. 3. 90,
521.
Fitz-G. 45.
3 Wms. 391,
393.
Comyns 1.
Cas. temp.
Talb. 97, &c.
140, &c.
Court against
the Plaintiff.
Diversity.
2 Salk. 466.
Vide 3 Keb.
711, 717.
Welch and
Baden, and
3 Keb. 552,
659, 678.
Ellis *versus*
Norton.

DEBT upon a Bond conditioned for Performance of Arti-
cles; the Condition recited, That whereas Sir Wm. G.
was Auditor of Wales for his Life, and had deputed the Defen-
dant's Testator to exercise his said Office during his good Beha-
viour, and that the Defendant pro Deputatione præd' did agree to
pay him yearly during the said Deputation 200 l. in Consideration
whereof the Defendant's Testator should have all the Rents and
Profits of the said Office to his the Defendant's Use, and like-
wise save the Plaintiff harmless, &c. and the Bond was for Per-
formance thereof. The Defendant pleads the Statute of 5 & 6
Ed. 6. c. 16. &c. making Bonds and Securities, &c. for certain
Offices void, without the necessary Averments, &c. Replication,
that the said Office had a fix'd Salary of 20 l. per Ann. belonging
to it, and that during the whole Time of the said Deputation,
the annual, just and legal Profits of the said Office did amount
to 329 l. 10 s. and that during all the aforesaid Time the Defen-
dant did receive yearly the said Sum of 329 l. 10 s. out of the Ex-
chequer, for the Fees and Profits of the said Office to his own
Use, and assigns Breach in not paying the said 200 l. for so many.
Rejoinder of the same Matter in the Replication, and Demurrer.
And the Case being three Times argued in this and the two pre-
cedent Terms, the Court were clear of Opinion against the
Plaintiff, and took this Diversity: If an Office described by the
Statute has a certain Salary annex'd to it, Deputation of such Office,
reserving a Sum less than the standing Salary, will not be within the
Statute. So if Fees be incertain, and no certain Salary annex'd to the
Office, reserving a certain Sum out of Fees, will not be within the
Statute; because in that Case, if the Fees answer not the Sum certain,
the Deputy is not to pay the Sum certain, it being payable out of the
Profits. But here the Event will not help it, it being void at first;
for the Fees being Things arising from the Business of the Office, which
may be more or less, they must be incertain, and yet the Defendant's
Testator at all Events was to pay a Sum certain, let the Fees be more
or less. Vide 3 Keb. 717, 659. Ellis *versus* Nelson. So they ad-
vised the Plaintiff to discontinue, which he denied. Jud. pro Def.
last Day of the Term, and the said Diversity allowed and con-
firmed

firmed for good Law; for if one reserve a Sum certain upon a Deputation out of the Profits or Fees, he only reserves Part of that which was wholly his before; for tho' by making a Deputy, the whole Power of Principal is in the Deputy; yet the Fees or Profits don't pass, and the Deputy has no Right to them: Then if he make a Deputy, reserving a Sum certain, Part of the Profits, and the rest to Deputy, he may well do it, for it is but reserving Part of what was wholly his.

If one put in a Deputy without any Allowance of Salary, he has no Remedy but by Quantum meruit, and that against his Principal.

Vide 3 Keb.
711, 717.
Hawk. P. C.
169.
Quantum me-
ruit for a De-
puty having
no Allow-
ance.

Davenant *versus* Rafter.

Error of a Judgment in C. B. upon Nil dicit in Debt upon a Bond for Want of an Original, the Defendant pleads a Release of Errors. The Plaintiff replies, That there was another Judgment between the Parties for the same Sum, and of the same Term, and that the Release was of that Judgment of which the Writ of Error was not brought, absque hoc that it was of this now in Question.

Vide Carlton's
Case.
Ante 113,
114, 206.
Ld. Raym.
1046, 1052.
S. C.
Error of
Judgment in
B. C. (in Debt
upon Bond)
for Want of
an Original.
1 Sid. 84.
See the Cases
cited ante,
113, 174,
206, &c.
Carthew 7,
200 & 339.

To which the Defendant demurs, and Eyre maintains the Demurrer, for by this Traverse, the Defendant is excluded from saying that there is but one Judgment, for it is only made an Inducement to the Traverse.

Per Cur'. The Question is, Whether there ought to be a Traverse in this Replication? For then you would cut out the Plaintiff from pleading Nil tiel Record. But your Way seems to have been, to have shewed one Judgment specially, and then to have averred the Release to have been of that Judgment, and so have rested. As suppose a Man has two Manors of Dale, and levies a Fine of his Manor of Dale, he shall by Averment ascertain of which of them it was. If Debt be brought upon a Sheriff's Bond conditioned for an Appearance in this Court die Veneris prox' post Mens. Mich. the Defendant pleads a Writ of Latitat taken out against the Party at the Suit of the same Plaintiff, returnable die Mercurii, and that the Party was upon that Writ arrested, and the Bond was given for his Appearance at another Day than the Return-Day of the Writ, and so the Bond is void by the Statute of 23 H. 6. The Plaintiff may come and say, that he took out a Writ returnable die Veneris, and that an Arrest was upon that, and the Bond for Appearance to it, without traversing the other Writ; and if a Thing which may in Process of Pleading become material and traversable be traversed before such Time, it is naught, as my Lord Hobart says. Now you have not shewed how this Matter was material.

Travers.
See Carthew
99, 100,
117, 196,
&c.
Ld. Raym.
42, 237,
238, 359.

Another

Another Objection was, That the Release pleaded did recite a Judgment in which the Plaintiff did recover 600 l. pro debito & dampnis ultra mis. & custag. the Errors in which the Plaintiff released; and the Judgment of which this Writ is now brought, is pro debito & dampnis only, without any thing of Costs, and so a plain Variance between the Judgment released and that now in Question; for at Common Law, before any Costs were given, the Form of entering of Judgments in Debt was pro debito & dampnis, as this is, and therefore the Judgment recited in the Release, and that of which this Error is now brought, are not the same.

Caf. temp.
An. 2.
Ld. Raym.
1221, 1047.

But per Cur'. In the Common Pleas, they always, in Case of Judgment by Nihil dicit, enter Judgment pro debito & dampnis, without more, tho' in this Court the Manner be, tam pro debito & dampnis quam pro mis. & custag. and Damages include Costs: And besides, in the Judgment recited in the Release, it does not say that any Costs were recovered, but ultra mis. & custag. he recovered 600 l. for his Debt and Damages.

3. It was objected, That Judgment ought not to be affirmed without a Certiorari, to ascertain the Court how the Matter stood below.

Vide ante
206, 207.
Yet for Pre-
cedents of
Judgment
affirm'd in
this Case.
Vide Raft.
300.
21 Ed. 4. 43.
1 Co. 14.
Release relied
on as an
Estoppel.

But the Court took this Difference: If the Defendant upon Error assigned will not come in and plead, there the Plaintiff must have a Sci' fa. against him ad audiend. Errores, and a Certiorari to certify the Want of Original, that being the Error assigned; but where the Defendant comes in gratis, and pleads In nullo est erratum, or other Plea which is ill, it is a Confession of the Error; and the Judgment was, Quer. nil capiat per Breve, because here is Error upon Record, but is released.

Note; At another Day it was objected, That the Conclusion of the Defendant's Plea was naught, for it was, Quod Quer. &c. excludatur, & quod Judicium affirmetur, when by Law the Judgment is to be affirmed; but it was over-ruled, for Quod Quer. præcludatur is enough, and the rest Surplusage.

Conclusion of
Pleas, &c.
See Instit.
Leg. 272,
512, 523,
&c.
Skinner 387,
517.
Caf. temp.
W. 3. 399.
1 Wms. 258.
Ld. Raym.
337, 339,
594, 853, 1018. Stra. 520.

And here Holt, Ch. J. took this Diversity as to Conclusions, That if a Dilatory be pleaded, and Plaintiff take Issue upon it, he may conclude with a petit Judicium & Damna, because there final Judgment shall be; but if Dilatory be pleaded, which Plaintiff does not deny, but confesses and avoids, he must conclude in Maintenance of his Writ: As if Defendant plead Attainder in Disability of the Plaintiff, and he replies a Pardon, he must not conclude with a Petit Jud. & Damna, but in Maintenance of his Writ.

Lady Cook *versus* Remington.

DEBT upon a Bond, with Condition to perform Covenants in a certain Indenture mentioned: The Defendant craves Oyer of the Indenture, which the Plaintiff gives him; and one of the Covenants therein was, That the Defendant would safely give up unto the Plaintiff the Goods, a Particular whereof was writ on the Back of the Indenture: The Defendant pleads Performance generally, to which the Plaintiff demurr'd.

127. 1 Saund. 9, 22. 1 Mod. 266. 1 Vent. 37. Keilwey 71. 1 Sid. 425. Cro. Jac. 360, 460. Vide 1 Saund. 22. Stra. 227, 1186, 1198, 1241.

2 Salk. 498.
S. C.

Vide ante

234.
Debt upon
Bond to per-
form the Co-
venants in an
Indenture,
&c.

1 Sid. 50,

97, 425.

1 Keb. 104,

Vide

And it was held per Cur'. 1. That when one is bound to perform Covenants in an Indenture, that in an Action upon such Bond, the Defendant, in order to discharge himself, ought to shew the said Deed to the Court, that they might see what the Covenants were; for he cannot shew that he has performed all, without shewing what he was to perform; and therefore he ought to recite the Indenture, whereof he is supposed to have a Counterpart, in his Plea; but if he never had a Counterpart, or had lost it, upon Oath thereof the Court will compel the Plaintiff to give him a Counterpart, in order to set it out for his Defence.

Counterpart.

2. That though the Plaintiff in this Case was not compellable to give him Oyer of the Deed, yet if he will do it, it will suffice for the Defendant to plead upon.

3. That the Indorsement here, at the Time of the Ensealing and Delivery of the Deed, was Part of it, and therefore Oyer of the Body of the Deed without Oyer of the Indorsement, was not a compleat Oyer of the Deed, the Deed relating to the Indorsement, and therefore not perfect without it; and it in this differs from an Obligation, with a Condition indorsed, for there may be Oyer of the Obligation without any of the Condition; and if one crave Oyer of the Obligation, he shall not upon that have Oyer of the Condition, because the Obligation is compleat and perfect without the Condition, and does not refer to it.

That the
Oyer was not
compleat,
there being
an Indorse-
ment of
Goods, &c.

4. If the Indorsement were after the Ensealing and Delivery of the Deed, and at another Time, it is a new Deed; and in that Case, if a Bond were to perform Articles in one Deed, and that Deed refers him to another, there to discharge himself, he must shew the Matter in the second Deed that is refer'd to from the first.

And if the
Indorsement
was after
Sealing and
Delivery, 'tis
a new Deed,
&c.

3 Wms. 419,

&c.

Stra. 18.

5. Here where the Plaintiff gave the Defendant an incompleat Oyer, viz. of the Deed without the Indorsement, he ought not to have rested satisfied therewith, but to set forth further the whole Purport of the Indorsement, or averr'd that there was none.

And Judic' pro Quer Nisi.

Judic' pro
Quer' Nisi.

P P P

Wells

Wells *versus* Ofmond.

Ld. Raym.
1044. S. C.
Vide 1 Salk.
31, 33.
2 Salk. 424.
Vide ante
25.

Libel in the
Admiralty
for Seamen's
Wages, &c.
3 Mod. 244.
Ld. Raym.
398, 632,
576, 639,
650, 739,
1206, 1211,
1247, 1248,
1453. Cal. temp. W. 3. 405, 408, 409, 440, 442, 526. Comyns 74, 137. Stra. 707, 858, 937, 968, 405.

Libel in the Admiralty for Seamen's Wages: It appeared, that the Builder did make a Contract for a Ship with an Owner; who thereupon had the Ship put into his Possession, and did contract with Seamen to go with him on a Voyage; and in order to rig the Ship for that Voyage, the Owner brought the Seamen to work for a considerable Time on Board the Ship; after which, through Disagreement between the Builder and Owner, the Voyage is put off, and the Seamen dismissed without their Wages, who now libel for their Wages against the Ship: And Prohibition was moved for, upon Suggestion that the Work was done in corpore Com', and no Voyage ever made.

Per Cur', If the Contract be, to go on a Voyage, &c. they shall sue for their Wages, &c.

And here the Ship is liable.

Sed per Cur', If a Contract be with Seamen to go on a Voyage, and they in order thereunto work in a Harbour, and after the Voyage is intercepted through the Owner's Fault, as if the Ship be arrested for his Debt, &c. the Seamen shall sue for their Wages, for their Work done so in Harbour in Pursuance of the Contract to go on a Voyage, in the Admiralty, as much as if they had gone the Voyage; *scilicet*, if the Retainer of them had been only to do the Work in the Harbour: And in this Case the Ship ought to be liable for their Suit, because the Builder, by trusting it into the Owner's Possession, gave him an Opportunity of engaging of Seamen, who are the easier induced because they see him in Possession of it; and they being Strangers to the Builder's Bargain with the Owner, ought not to suffer by its not being performed, and the Builder might have taken Care to secure himself from any such Charge, when he entrusted the Owner with the Possession of his Ship, whereby he render'd it obnoxious to the Wages of such Seamen as he should bring on Board her in order to go a Voyage in her: And the Motion for a Prohibition was denied.

The Reason why Seamen may sue in the Admiralty.

And per Cur', The true Reason why Seamen may sue for their Wages in the Admiralty, though the Contract be at Land, is, That there the Ship it self is made liable to them; and besides, there they may all join in the Suit, neither of which may be at Common Law, and yet both are much for the Ease of poor Seamen.

At what time Bail may surrender the Principal, tho' Notice be not to the Plaintiff.

Ld. Raym.
156, 157,
445, 721.
Cal. temp.
W. 3. 99,
236, 319,
559, 583.

Per Cur', If Bail surrender the Principal at or before the Return of the second *Sci' fac'*, it is good, though there be not immediate Notice of it to the Plaintiff; for the End of Notice in that Case is twofold: One that the Plaintiff may, if he pleases, charge him in Execution; the other, that he be at no further Trouble or Charge in proceeding against the Bail; but if, through Want of Notice, he is at further Charge against the Bail, that shall not vitiate the Surrender; but yet the Bail shall not be delivered till they

I

1 Mod. Cal. in L. & Eq. 282. 2 Barnes 62.

they pay such Charges. If at any Time after the Return of the Capias the Bail surrender the Principal at a Judge's Chamber, and he thereupon is committed to the Tipstaff, from whom he escapes, or is rescued, that will not be a good Surrender, because it is Indulgence to the Bail to surrender after a Capias return'd; secus if it be before a Capias return'd, for to surrender before, or at Return of Capias, is Matter of Right: And now by the Rule of Court, upon the first Sort of Surrender the Principal ought to be two Days in the Marshal's Custody, to make it a good Surrender.

Ride *versus* Ride.

Vide 2 Salk.
447, 552.

A Popish Recusant conviã made his Wife, another Popish Recusant, his Executrix, and they would suffer her to prove the Will in the Spiritual Court; and a Prohibition being moved for, upon the Statute of-----El. c. 4. sect. 22. Per Cur', It was granted, for she is disabled by the general Clause, and not enabled by the Proviso.

Prohibition to the Spiritual Court, &c.
2 Mod. Caf.
in L. & Eq.
33, 54, 146,
154, 155,
167, &c.
172, 173.

Caf. temp. Mac. 512, &c. 115, &c. 357, &c. 406, &c. 483, 536, &c. Gilb. Eq. Rep. 237, &c. 1 Wms. 353, 354. 2 Wms. 3, 5, 6, 132, 135, 361, 362, 364. 2 Barnes 1, 276. 3 Wms. 49. Comyns 169, 207, 570, 307. Stra. 267, 318, &c. 1096.

Domina Regina *versus* Foxby. Antea 11, 178, 213.

2 Keb. 687.
1 Mod. 71.
1 Salk. 382.
Ld. Raym.
1094. S. C.

Judgment upon an Indictment at the Quarter-Sessions of Maidston, was reversed; the Indictment being, for that she was communis Rixa, a common Scold, instead of Rixatrix.

Rixa for
Rixatrix.

Anonymus.

Covenant against Husband and Wife upon a Deed of Demise to the Wife dum sola; whereby she covenanted, That she would every Year, during the Term, plant so many Daken Plants on the Premises: Breach assign'd, that aliquos querculos aliquo Anno durante Termino annuatim, they or either of them, non seruit seu plantavit.

Covenant against Husband and Wife upon a Demise to her dum sola, &c.
Caf. temp.
W. 3. 383.
Caf. temp.

Mac. 163, 164, 246. Stra. 229, 1272, 1094.

Montague objected, That the Wife ought not to be joined in the Action for Breach since the Coverture; sed non allocatur; if the Wife had assigned dum sola, the Action for Breach would lie against the Husband and her jointly: And as to the Annuatim aliquo Anno, at most it is but Surplusage, and shall be rejected.

So if she had assigned dum sola.

Jud' pro Quer'.

Domina

Domina Regina *versus* Branworth.

A Petit Chapman indicted as an idle Person, &c.

Indictment by Jury of the Town of Portsmouth, For that he, being an idle Person, did wander in the said Town selling of Small Ware as a Petit Chapman: And to maintain this Indictment, it was urged, That a Petit Chapman is a Vagabond by the Statute of 39 El. cap. 4. And tho' some Petit Chapmen, that is, such as are legally qualified by the Statute of 8 & 9 W. 3. c. 25. may now lawfully use that Occupation, yet that Act excepts Boroughs and Corporations, so as to them they remain in statu quo.

That a Vagabond *quatenus* such, is not Indictable. Caf. temp. An. 3. Ld. Raym. 1360, 790. Q. if without Certificate. Vide Braët. Lib. 3. cap. 10. con. 3 Inst. 103.

Holt, Ch. Just. Is a Vagabond, quatenus such, indictable? And it seems not, for at Common Law a Man might go where he would; but if he be an idle and loose Person, you may take him up as a Vagrant, and bind him to his Good Behaviour by the Common Law; and by the Statute of Labourers, he may be compelled to serve: There is indeed a Way by Law for punishing incorrigible Rogues, by burning them in the Shoulder, and sending them to the Gallies; from whence it may be urged, that there must be a Way before of Convicting them of being Rogues, for they cannot be punished otherwise as incorrigible Rogues; and that first Conviction must be by Indictment.

But per Holt, Ch. Just. No; but by being judged by a Justice of Peace to be a Vagrant, and used by him as such, and if he offend again, he may be indicted as a common Vagrant: Rule for quashing it was enlarged.

2 Salk. 423. S. C. Ld. Raym. 1099. S. C. To Trespass, Assault and Battery, &c. Limitations. Vid. ante 25. post 309. Carthew 3, 136, 144, 335, 471. Ld. Raym. 435.

Blackmore *versus* Tiddlerly.

Trespass, Assault and Battery: The Defendant pleaded Not guilty infra sex Annos, and Demurrer to Plea, as being argumentative, for the Statute limits this Action to four Years, and not to six: It is indeed an Argument, That if it was not within six, it could not a fortiori be within four; but Pleadings ought to be direct, and not illative.

It seem'd at first to Court, that Plaintiff might have join'd Issue for his own Advantage.

But per Cur', You might well have joined Issue with them upon this Plea; for if they have taken a larger Compass than they need, it is for your Advantage: Upon this Issue you might have given Battery after four Years, and within the six, in Evidence; and it would have maintained your Issue, and you could have Judgment thereupon, it being found for the Plaintiff, without the help of the Statute of Jeofails: So if the Plea had been Not guilty within a Week or a Year, and Verdict for the Plaintiff, he should have Judgment, for Guilty or Not guilty is the Substance: Sed Hill' prox' tot' Cur' contra.

Per Holt, Ch. Just. If Devise be to the Heir at Law, paying such and such Legacies, &c. and for Default thereof, Remainder over, the Heir till Default is in by Descent, and the other's Interest is by way of Executory Devise: And so it was in Pell and Brown's Case in Effect, in 1 Cro. where the Fee was devised to one that was not Heir, the Remainder to him that was Heir, there the Heir was in by Descent; and it's hard to maintain, either by Use or Devise, a Remainder to a Stranger, after a present Fee to one who is not Heir at Law: Vide 3 Cro. Sole *versus* Gerard, And. 833, 919. Carthew 224. Skinner 206, 207, 269, 340.

Mac. 421, 425. 1 Mod. Caf. in L. & Eq. 23. Stra. 491. Vide 3 Cro. Gilpin's Case 161.

A Devise to Heir at Law, paying, &c. and for Default thereof, Remainder over, &c. Preced. Chan. 222. Comyns 72, 123. Ld. Raym. 728, 829. Caf. temp. Gilpin's Case 161.

Reignots *versus* Tipping.

Vide 1 Salk. 399.

PER Cur' & omnes Clericos: After a Rule to sign Judgment, there ought to be four Days exclusive of the Day on which the Rule, and of the which the Judgment is sign'd; and the Meaning of the Rule is, That the Party might have reasonable Time to bring a Writ of Error, if he see Occasion; but in the Common Pleas they never give Rules for signing of Judgment, but they stay till the quarto die post, which makes but four Days inclusive.

Time of signing Judgment, &c. Ante 191. 2 Salk. 518.

Denham *versus* Stevenson.

1 Salk. 355. S. C.

DEBT by Administrator against the Heir upon Bond of Ancestor; and declares cui Administratio omn' Bonor', &c. by such a Peculiar debito modo commissa fuit; without saying that he had ordinary Jurisdiction, or that it did of Right belong to him to commit Administration, and Demurrer to Declaration.

Debt by Administrator upon Bond against an Heir. Ld. Raym. 562, 856.

And, First, It was excepted, That he had not shewn how the Defendant was Heir; and for the Necessity, was quoted. Hob. 333.

Demurrer to the Narr', &c.

But per Cur', The Diversity is where he sues as Heir; there, because he is presumed consulant of his Pedigree, he ought to shew it; secus where he is sued, because Strangers shall not be compelled to shew what lies not in their Knowledge.

2d Exception; He makes Title by Vertue of Administration committed by a Peculiar, without alledging any Right in the Peculiar to commit Administration, and that is Substance and traversable; for de communi Jure here in England, it belongs to the Ordinary: Vid. 1 Sid. 228. 2 Ventr. 84. Cro. Jac. 556. & 12 W. 3. in B. R. Gidley *versus* Williams.

He does not alledge any Right in the Peculiar, &c. Ante 134, 136. 1 Lev. 71. 5 Mod. 425. Vid. 1 Lutw.

Contra. It was urged, That at most it was but Matter of Form; the Omission whereof is not to be objected upon general Demurrer; and upon Issue the Plaintiff would not be put to prove, that the Peculiars had Right to grant Administration.

8, 297, 298. 2 Mod. 65. 1 Sid. 90. 3 Lev. 211. R. 'Tis only Matter of Form.

Ch. Just. He
ought to shew
the Peculiar's
Right to
grant, &c.
5 Mod. 425.
1 Sid. 228.
1 Lutw. 8,
297.
2 Mod. 65.
Cro. Eliz.
431, 791,
838, 879,
907.
1 Sal. 40, 41.
Carth. 148.
Ante 134.

That 'tis
doubted if
the Right of
Archdeacon
ought not to
be shewn.

No Rule
given.

Holt, Ch. Just. It cannot be said to be only Form; for it is the committing Administration by one having legal Authority, that vests Cause of Action in the Plaintiff, and the Ordinary by Law is to commit Administration; and in all Cases of Peculiars, you must shew Title and Right to grant Administration, and the least Averment that can do it, is to say, That de Jure it did belong to him to grant Administration; for the Court cannot take Notice of Peculiars, but may of Bishops; and Profert in Cur' literas Administrat', is not enough, for they only certify what is on the Face of them, viz. that Administration was committed to the Plaintiff by such a one, but that does not import he had any Right to grant any.

Powell. Might not the Defendant come and traverse his having Right to commit, if you had alledged it; And in the Case of Chiverton *versus* Trudgeon, in 2 Cro. 556. it was doubted, whether the Right of Archdeacon, who is taken Notice of by us as oculus Episcopi, ought not to be shewn; but all the Matter is, that here it's said, debito modo commiss' fuit, whether that shall be taken only in respect to the legal Form of the Instrument, or to the Peculiar's Right of committing? And I rather believe the first, and debito modo seems to me not to be enough to traverse; they might indeed have traversed the Administration committed, and given in Evidence, that he had not Right to commit Administration: And no Rule was given.

Bignall *versus* Devnish.

When Bail
above upon
removing a
Cause, &c.
1 Salk. 104,
105, 106.
Ld. Raym.
603, 696.

Judge's deny-
ing legal Evi-
dence, &c.
Ante 22, 222.
Farell. 53, 64.
3 Salk. 649.

PER Cur', If the Defendant upon Habeas Corpus remove a Cause from an inferior Court, in which there ought to have been special Bail below, he shall not thereby put the Plaintiff in a worse Condition, but be compelled to give in Bail above; but as to the Sum which the Bail are to justify themselves worth, that may be moderated as the Court sees Occasion.

Per Cur', Good Cause of new Trial, where the Judge who tried the Cause has denied to admit that for Evidence which was legal Evidence, or where he misdirects the Jury.

Middleton *versus* Haw. Hill. 3 Annæ.

Variance.
Execution by
Fi. Fa. in
Debt, &c.

SCi' fac' upon a Judgment in the Case, and pleaded Execution by Fi' Fac' by Judgment pro debito & damnis, which is different.

Jud' pro Quer'.

Domina Regina *versus* Rawlins. Hill. 3 Annæ.1 Salk. 367.
S. C.

HE being bound by a Recognizance, to appear the first Day of Term, at which Time the Attorney filed an Information against him, he would imparl, and the Attorney General would have the Imparlance to Crastin' Animar'; for heretofore, when one came in upon a Recognizance, or Habeas Corpus, they were put to plead instanter. Indeed, in the Bishop's Case, by great Advice, they pleaded, They ought to have Time to imparl, but ruled they should plead instanter: But that was thought hard, and is now redress'd; but it was never intended to grant greater Indulgence of the Crown-side, than is of the Plea-side: Where the Course is, That if a Declaration be delivered before Crastin' Animar', q2 1 Lilly 389, Mens. Pasch. the Defendant shall not give a Plea so as to try it 390. that Term, but he must plead so as to enter.

Holt, Ch. Just. If in a Michaelmas Term a Writ of Summons had issued upon an Information, and the Defendant comes in voluntarily thereupon, there is Reason he should have an Imparlance; but yet not to another Term, because in that Case, by due Process continued, he might be brought in upon an Attachment the same Term, so as to be compellable to plead instanter; and where upon standing the Length of Process, they must have pleaded the same Term, there is Reason that upon a voluntary Appearance they should have so much Time allowed to plead, as they might have gained by running out the Length of Process, and no more; but the Information is now of this Term, and till Information exhibited there cannot be a Summons; the Defence being in Middlesex, the Summons indeed may be made returnable at any Day certain: And on the Crown-side the Course was, Whenever an Imparlance has been that it was granted to another Term, an Imparlance in these Cases cannot be without Leave of the Court; and the Reason of an Imparlance is, that the Defendant may have a reasonable Time to advise what to plead, and the Court are Judges of that Time. Heretofore there have been Imparlanes from one Return of Michaelmas Term to another of that Term; but in Plea-side, now we have Imparlanes to a Day certain in the same Term: Yet, though the Court declared this very reasonable, no Rule was made. Of Imparlance in Appeals, &c. See 2 Hawk. chap. 23. sect. 102. And Note; where a Cause is by Original, 'tis said an Imparlance is ex Gratia Curie. See Skinner 2.

What Imparlance in a Michaelmas Term, &c.

No Summons till Information exhibited, &c. Course on the Crown-side.

Arnote *versus* Breame. Pasch. 3 Annæ.

1 Salk. 76.
S. C.
2 Salk. 498.
Ld. Raym.
1076. S. C.
Debt upon a
Bond for Per-
formance of
Award, &c.
Ante 231.
Vide 2 Salk.
425.
1 Lutw. 382,
386.
Post 311.
Cas. temp.
An. 170.
Cas. temp. W. 3. 4, 8, 116, 117, 129, 130, 139, 585, 588, 635. Cas. temp. Mac. 333. Stra. 737, 1025, 1082.

DEBT upon Bond for Performance of an Award, reciting several Differences between the Plaintiff and Defendant, concerning a Piece of Ground South of the Plaintiff's House adjoining to the River Thames, and used as a Wharf, and the erecting several Piles of Boards and Scaffolds thereupon to the Nuisance of the Plaintiff's House; all within the Liberties of St. Bride's Hospital, London: Null' Award pleaded, and an Award set forth, adjudging, That the Defendant should enjoy the said Piece of Ground as a Wharf, and that the said Scaffolds should be pulled down and removed. And on Demurrer, several Exceptions were taken to this Award:

Exception,
That the
Date of it
does not ap-
pear.
R. It is said
to have been
made on such
a Day, &c.

Where the
making of an
Award is the
Date of it.

That the
Award is *de*
& *super Præ-*
missis, &c.
1 Salk. 70.
Ante 232.

That the
Award is not
final or cer-
tain, it not
being award-
ed, &c.
Vid. tamen
2 Vent. 242.

1. It does not appear what the Date of it was; so it may be, it was made without Authority, as before the Submission; sed non allocatur, for it's alledged to have been made on such a Day, which appears to be within the Time; and if no Date be set out, it shall be intended it had none, and then it's good from the Delivery, according to 5 Co. Clayton's Case; and every Writing or Deed has a Date in Law, viz. the Time of the Delivery thereof, and a Deed may bear Date one Day, and be delivered on another, and the Day of Delivery is the Date, and the other the bearing Date; and the Making an Award or Deed, is that which gives it the Essence and Being of a Deed or Award, and that is the Date of it.

2. It was objected, That Submission was of Ground, &c. within the Liberty of the Hospital of Bridewell, and of Scaffolds, &c. newly erected; and the Piece of Ground mentioned in the Award is not averr'd to be within that Liberty, nor newly erected: Sed per Cur', The Award is said to be *de & super Præmissis*, and therefore it shall be intended within the Submission, if contrary be not shewn of the other Side, which the Defendant cannot now do after Null' Award generally pleaded, for that would be a Departure.

3. It is not awarded who shall pull down the Scaffold, therefore Award not final or certain, ideo so far void, and this not to be helped by any Averment or Intendment of the Court: Vid. Style 365. 1 Roll. Abr. 164. 5 Co. 78. a. Cro. El. 432. Mo. 39. and the Diversity is, when a Thing incertain may in the Nature of the Thing be made good by Averment or Intendment, and when not; as if one covenant to give Bond or Obligation for Enjoyment of Land, there it must be to the Value of the Land, or for Payment of such a Sum, it shall be in double the Sum, Cro. Jac. 116. but in Award it is not so, for to admit of Averment, is to admit the Matter not determined, since the Averment would be traversable, and to intend would be to make, not to expound an Award: And it's not an Answer to say, That it appears on the Face of the Award, that the Land was the Defendant's, and therefore the Nuisance being thereupon, it ought to be removed by him, who may come there without being a Trespasser. For,

1. It

1. It does not necessarily appear, that the Ground was his; for the Award is only, that he should use it as a Wharf; which rather shews, that it was disputed whether it was his Right before.

2. It does not shew it to be his now; for the Words only are, That he should use it as a Wharf; that is, that he should have Liberty of Wharfage there; and if it be admitted to be his Ground before; (for if it were the Ground of the Plaintiff, the Erection of the Boards could not be a Nuisance to his House,) yet a Nuisance is by Law abateable by him to whom it's a Nuisance; and if it were not, the Arbitrators might, by awarding the Plaintiff to pull it down, enable him to do it without Danger of becoming a Trespasser thereby: So it being left indefinite, whether the Plaintiff or Defendant shall pull it down, it's therefore void for Incertainty; and then this being assigned only for Breach, tho' the Award for other Particulars were good, the Plaintiff cannot recover, there appearing no Cause of Action on the whole Record for him, according to Turner's Case, 8 Co.

It does not necessarily appear the Ground was the Defendant's, &c.

Vide post 314. A Nuisance is abateable, &c. See Co. 9. 54, 59. So being indefinite, Award is void for Incertainty. 8 Co. 132, &c.

And of this Opinion, Holt, Ch. Just. seemed to be; but Powell, Powys and Gould clearly contra: For when they declare it to be a Nuisance, and that it should be removed, who should remove but he on whose Ground it was? And though in Point of Law any may remove, what is to his Nuisance; yet in Case of Award, which is by Judges of Equity as well as Law, it must be intended that it was to be done by the Party on whose Ground it was.

Jud' pro Quer': Holt dubitante ut supra.

Judic' pro Quer'.

Per Cur', Upon a Writ of Error, if the Clerk below will certify the Record wrong, Case will lie against him for it; and if he make no Return, the Plaintiff may have a Writ of Executione Judicii out of Chancery.

Action, &c. where a Record is wrong certified in Error. 1 Mod. Caf. in L. & Eq. 226.

Domina Regina versus Jacob Banks Mil'.

2 Salk. 652. S. C. Ld. Raym. 1082. S. C. Vide 1 Salk. 380. An Indictment found against the Defendant at the Quarter-Sessions, &c. for an Assault Trial.

AN Indictment was found against him at the Quarter-Sessions of Berkshire, for an Assault upon Mr. Culpeper in Windsor-Castle, and the Indictment removed up by Certiorari at the Suit of the Prosecutor: Both he and the Defendant took out Processes, made up Records, and took Warrants of Nisi prius, to try it at the next Assizes after Removal; and the Prosecutor not thinking fit to carry it on, the Defendant put in his Record, and was tried and acquitted. And now a new Trial was moved for by the Prosecutor; for that when an Indictment is originally preferred here above, or found below, and removed up here by the Prosecutor, the Defendant cannot carry it down to Trial till after a Default in the Prosecutor, nor even then without Application to the Court, and Leave had; Vid. 2 Leon. 110. It's so in case of an Information qui tam, because, as the Book says, it quodammodo concerns the Queen; a fortiori then will it be in case of Indictment, which altogether concerns her.

If Difference
in such Case
between an
Indictment
and Informa-
tion.

To which it was answered, That there was a great Difference between an Indictment and an Information; for an Indictment being a Charge by Oaths of twelve Men, is much heavier; and for that, one ought to be allowed all imaginable Speed to clear himself of it, and not to be continued under such Imputation till the Prosecutor thinks fit to bring it to a Trial; but an Information is a bare Suggestion, and therefore is more easily rested under.

And as to another Objection that was made, That such a Course, if tolerated, would be of great Mischief, for then most profligate Offenders would get themselves acquitted by Surprise, or overhastening the Trial, without allowing the Queen convenient Time to manage her Prosecution:

No *Nisi prius*,
Etc. without
Warrant from
Attorney Ge-
neral.
Vide Savil 2.

It was answered, That there could be none, because in Crown Causes there cannot be *Nisi prius* or Tales, without a Warrant from the Attorney General, who will be sure to grant none if he find any such Danger; and that such a Thing may be at least by Consent, appears 1 Keb. 195. the King *versus* Jones; and the Granting a *Nisi prius* amounts to a Consent.

Former Prac-
tice concern-
ing Removals
of Indictments
by *Certiorari*.

Per Cur', Before the late Statute of 5 & 6 W. & M. c. 2. concerning Removals by *Certiorari*'s, if the Defendant had removed an Indictment from any County besides London and Middlesex, he was sine die out of Court, and only to be brought in upon Process, whereupon he might have been outlawed; but in that Case the Defendant might have come in voluntarily if he pleased: But if the Indictment had been removed from London or Middlesex by the Defendant, there he must have enter'd into a Recognizance to carry it down to Trial the same Term, or the Sitting after; and in Imitation of this Practice in these two Counties was the late Act made, whereby the Defendant upon *Certiorari* brought by him to remove an Indictment out of any County in England, must enter into a Recognizance to carry it down and try it the next Assizes, because of the great Delay of Justice occasioned by the other Course; but if the Prosecutor does remove it up, the Defendant upon pleading does not enter into a Recognizance to try it, and that begets the Question, Whether notwithstanding he may immediately carry it down to Trial? And it was allowed here, that this being removed up by the Prosecutor before Plea, the Defendant was out of Court, and sine die, and might be brought in by Process, or sued to an Outlawry, or if he pleased might come in voluntarily; and if Indictment be found here, the Defendant upon pleading shall give Security to try it.

How by the
late Act of
5 & 6 W. &
M.
1 Salk. 380.

Et per totam Cur', After great Consideration, it was resolved:

Per Cur', In
Civil Actions
Defendant
can't try by
Proviso, Etc.
Vide 2 Lev.
5, 6.

1. That in Civil Actions the Defendant cannot carry down a Cause to Trial by Proviso till after Default in the Plaintiff, except in special Cases where the Defendant is in some respect in Nature of a Plaintiff, as in Quare Impedit, Replevin and Prohibition, to have a Writ to the Bishop, Return or Consultation.

2. There

2. There cannot be a Trial by Proviso in the King's Case, because there can be no Laches in the King. None in the King's Case.
3. A Defendant may at the first Instant by Consent of the Prosecutor, carry his Cause to Trial where the Queen is Party. Yet he may by Consent of Prosecutor.
4. That all Causes of the Queen in this Court must be tried at Bar, if Mr. Attorney will not grant a Warrant of Nisi prius. Where Trial must be at Bar, &c.
5. That that Warrant in its Nature is no more than a Consent, that the Cause may be tried in the Country; but not that the Defendant should carry it down irregularly, or contrary to the usual Course.
6. That if Mr. Attorney will grant a Nisi prius by Surprise, and after shew that to the Court, they will supersede it. If Att' Gen' be surprized.
7. Which was the main Point in this Case, that in all Indictments and Informations here, or Indictments removed hither by the Prosecutor for Treason, Felony, or any inferior Offence, the Defendant has no other Way to hasten on his Trial, but by Application to the Court; who upon hearing the Reasons of Mr. Attorney, will, as they see Occasion, either give him further Time, or fix him a Day peremptory for the Trial, or give the Defendant Leave to bring it on himself. Defendant here to hasten Trial, must apply to the Court for Leave. Caf. temp. W. 3. 647. 304. Caf. temp. An. 33. Stra. 816.
- And per tot' Cur', A new Trial was granted; and directed it for a Rule hereafter, that the Defendant should never carry an Indictment removed hither by the Prosecutor to Trial, without Leave of the Court. New Trial granted, and a Rule settled. See Carth. 499, 507.

French's Case.

HE had been arrested at the Suit of several Persons, and had given in Bail; who having charged him with an Action of 4000 l. had him taken up in the City, and committed to the Poultrey Counter, in order to remove him by Habeas Corpus, and rendered in Discharge of themselves to the Prison of the King's Bench, where the original Actions were brought; and it being Circuit-time, and all the Judges out of Town, before the Bail could render him, he was charged with the Queen's Debt; and the Bail having now brought an Habeas Corpus to remove him up, and render him, the Attorney General opposed it, because the Queen, as he alledged, might choose her Prison, and the Counter was safer than the Marshal's Prison; and quoted the Case of Village and Clayton, as a Precedent for him. Bail in Circuit-time, charge the Principal with 4000 l. &c. Ld. Raym. 603. Stra. 641, 1217. He was soon after charged with the Q's Debt, &c.

But per Cur', If he had been taken up by the Queen first, there might be some Reason that they should not for their own Case lessen the Queen's Security of her Prisoner; and that the Queen's Interest concurring with that of the Subject, should be prefer'd; but of the other hand, the Bail having taken him up here, and the Queen taking Advantage thereof in charging him with her Debt, ought not to prejudice them: And he was turned over. Per Cur', It might be if he had been first taken at Queen's Suit. Vide 1 Cro. 389.

Stillingleet

Stillington *versus* Sir Harry Parker.

In Ejectment
to prove a
Lease to the
Queen, an
ancient Book
of Entries
was offered.
Vide ante
225.
1 Salk. 285,
286, 287.
2 Salk. 690.
Farell. 129.
Ld. Raym.
730, 734.
735, 1292.
Stra. 162.

AT a Trial at Bar in Ejectment, the Question was upon the Time of the Commencement of a Lease, which was to commence upon the Determination of a Lease then in Being to Queen Eliz. And to prove such a Lease to the Queen, an ancient Book, in which were Entries of Leases of the Premises ever since Henry the Seventh's Time, and found among the Evidences of the Bishops (this being Bishop's Land) was offered, and opposed, because not such good Evidence as they might have had, because this being to the Queen must have been inrolled, and then they might have brought a Copy of the Inrollment. And tho' it was answered, that to prove the Lease a good Lease, it would be necessary to produce a Copy of the Inrollment, because without Inrollment the Queen could not take, yet to prove a Lease in fact this would be good Evidence, and that was what it was offered for. Yet,

Per Cur'. Inrollment is better Evidence of a Lease in fact than the Book; ideo it must be produced.

Per Cur'. Queen cannot be Tenant at Will.

Queen can't
be Tenant at
Will.

1 Salk. 27.
S. C.
Ld. Raym.
1085. S. C.

Burkmire *versus* Darnell.

Intr. Pasch. 3 Ann. Rot. 64.

In Case the
Defendant
undertook
that J. S.
would redeliver
a Horse,
&c.

IN Case the Plaintiff declared, That in Consideration that at the Request of the Defendant he would let a certain Gelding of his out to hire to J. S. he the Defendant did undertake the said J. S. would redeliver him to the Plaintiff; that accordingly he did let him out his Gelding, but that J. S. did never redeliver him. At the Trial it appeared upon Evidence, that the said J. S. came to the Plaintiff to hire a Horse from him, who mistrusting, was unwilling to let him have his Horse; whereupon the Defendant came and desired him to let him have it, and that he should undertake J. S. would redeliver him safe. And the Chief Justice doubting whether this Promise was not void by the Statute of Frauds and Perjury, it being not reduced into Writing, directed a Verdict for the Plaintiff, but saved them the Matter to be taken Advantage of above.

Obj. That
this Promise
is void by
Statute of
Frauds, as
being to answer
for Default of another,
and not reduced into
Writing.

And now Serjeant Darnell argued, That it was void by the Statute. If the Words had been, Let him have the Horse, and if he don't redeliver him, I will; that had been plainly within the Statute, for it is answering against the Default of another, and the Undertaking here is the same in Substance, for it is, that he shall do that which by Law he was bound to do, and that is answering for the Default of another. Indeed if the whole Credit and Reliance had been upon the Defendant's Account, so as the Plaintiff could have no Remedy against J. S. for the Non-delivery, it had been otherwise. And he

he quoted a Case in the second Year of the late King and Queen, resolved upon this Difference, viz. That where the Plaintiff has an Action against the Party for whom the Undertaking is, there no Action will lie against the Undertaker, without the Promise be in Writing: Secus where no Action does lie against the Party, for then the whole Credit is entirely upon Account of the Undertaker, and the other looked upon as his Servant; and the Sale and Contract is, in Judgment of Law, to the Undertaker, tho' the Delivery be to the other Party as his Servant: As if A. comes to B. and tells him, Hire your Horse to J. S. and I will see you paid the Hire; there the Hiring is to A. and not J. S. who is considered as Servant to A.

Raymond contra. I agree the Difference taken by Mr. Serjeant, but will make a quite contrary Inference from it; so the Point between us must depend upon the Fact of the Agreement, and yet I would distinguish upon the said Diversity. It is said, where an Action lies against the Party, it will not lie upon a Parol Promise against the Undertaker; that is, where an Action lies against him upon the original Contract or Agreement, it is true; but where an Action lies against him upon a Matter collateral to the Contract, I deny the Rule. And the Words of the Statute shew, That the Undertaking made void, is an Undertaking for the Party's performing the original Contract: And here, upon the original Contract, no Action would lie against J. S. for not delivering back the Horse, tho' indeed if he refuse to do it upon Request, Detinue or Trover will lie against him, not upon the Contract, but upon the subsequent Tort of keeping that from us which of Right we ought to have, and belongs to us.

Cur', Clearly the Words [Default of another] in the Statute, is the Default of another in performing his contract, and if the whole Credit be not entirely given to the Undertaker, so as no Remedy lies against the Party upon the Contract, but that the Undertaker comes in Aid of the Credit given by the Contract to the Party, the Undertaking will be within the Statute. And they also agreed the Case put by Darnell, and further said, If two come to a Draper, and one of them says, Let this Person have so much Cloth, and I'll see you paid; there the Sale is to the Undertaker only, tho' Delivery be to another by his Appointment; but if Contract be made with A. and the Vendor scruples to let the Goods go without Money, and B. comes to him, and desires him to let A. have the Goods, and undertakes that A. shall pay him, that will be a Promise within the Statute: So the whole Question will be, Whether the Plaintiff had any Remedy upon the Contract against J. S?

As to the
Words in Stat.
[Default of
another.]

And Darnell insisted on it, That there is a Remedy upon the Bailment against J. S. by Contract in Law.

S f f

But

Stillington *versus* Sir Harry Parker.

In Ejectment
to prove a
Lease to the
Queen, an
ancient Book
of Entries
was offered.
Vide ante
225.
1 Salk. 285,
286, 287.
2 Salk. 690.
Farell 129.
Ld. Raym.
730, 734,
735, 1292.
Stra. 162.

AT a Trial at Bar in Ejectment, the Question was upon the Time of the Commencement of a Lease, which was to commence upon the Determination of a Lease then in Being to Queen Eliz. And to prove such a Lease to the Queen, an ancient Book, in which were Entries of Leases of the Premises ever since Henry the Seventh's Time, and found among the Evidences of the Bishops (this being Bishop's Land) was offered, and opposed, because not such good Evidence as they might have had, because this being to the Queen must have been inrolled, and then they might have brought a Copy of the Inrollment. And tho' it was answered, that to prove the Lease a good Lease, it would be necessary to produce a Copy of the Inrollment, because without Inrollment the Queen could not take, yet to prove a Lease in Fact this would be good Evidence, and that was what it was offered for. Yet,

Per Cur'. Inrollment is better Evidence of a Lease in Fact than the Book; ideo it must be produced.

Per Cur'. Queen cannot be Tenant at Will.

Queen can't
be Tenant at
Will.

1 Salk. 27.
S. C.
Ld. Raym.
1085. S. C.

Burkmire *versus* Darnell.

Intr. Pasch. 3 Ann. Rot. 64.

In Case the
Defendant
undertook
that J. S.
would redeliver
a Horse,
&c.

IN Case the Plaintiff declared, That in Consideration that at the Request of the Defendant he would let a certain Gelding of his out to hire to J. S. he the Defendant did undertake the said J. S. would redeliver him to the Plaintiff; that accordingly he did let him out his Gelding, but that J. S. did never redeliver him. At the Trial it appeared upon Evidence, that the said J. S. came to the Plaintiff to hire a Horse from him, who mistrusting, was unwilling to let him have his Horse; whereupon the Defendant came and desired him to let him have it, and that he should undertake J. S. would redeliver him safe. And the Chief Justice doubting whether this Promise was not void by the Statute of Frauds and Perjury, it being not reduced into Writing, directed a Verdict for the Plaintiff, but saved them the Matter to be taken Advantage of above.

Obj. That
this Promise
is void by
Statute of
Frauds, as
being to answer for
Default of another,
and not
reduced into
Writing.

And now Serjeant Darnell argued, That it was void by the Statute. If the Words had been, Let him have the Horse, and if he don't redeliver him, I will; that had been plainly within the Statute, for it is answering against the Default of another, and the Undertaking here is the same in Substance, for it is, that he shall do that which by Law he was bound to do, and that is answering for the Default of another. Indeed if the whole Credit and Reliance had been upon the Defendant's Account, so as the Plaintiff could have no Remedy against J. S. for the Non-delivery, it had been otherwise. And he

he quoted a Case in the second Year of the late King and Queen, resolved upon this Difference, viz. That where the Plaintiff has an Action against the Party for whom the Undertaking is, there no Action will lie against the Undertaker, without the Promise be in Writing. Secus where no Action does lie against the Party, for then the whole Credit is entirely upon Account of the Undertaker, and the other looked upon as his Servant; and the Sale and Contract is, in Judgment of Law, to the Undertaker, tho' the Delivery be to the other Party as his Servant: As if A. comes to B. and tells him, Hire your Horse to J. S. and I will see you paid the Hire; there the Hiring is to A. and not J. S. who is considered as Servant to A.

Raymond contra. I agree the Difference taken by Mr. Serjeant, but will make a quite contrary Inference from it; so the Point between us must depend upon the Fact of the Agreement, and yet I would distinguish upon the said Diversity. It is said, where an Action lies against the Party, it will not lie upon a Parol Promise against the Undertaker; that is, where an Action lies against him upon the original Contract or Agreement, it is true; but where an Action lies against him upon a Matter collateral to the Contract, I deny the Rule. And the Words of the Statute shew, That the Undertaking made void, is an Undertaking for the Party's performing the original Contract: And here, upon the original Contract, no Action would lie against J. S. for not delivering back the Horse, tho' indeed if he refuse to do it upon Request, Detinue or Trover will lie against him, not upon the Contract, but upon the subsequent Tort of keeping that from us which of Right we ought to have, and belongs to us.

Cur', Clearly the Words [Default of another] in the Statute, is the Default of another in performing his contract, and if the whole Credit be not entirely given to the Undertaker, so as no Remedy lies against the Party upon the Contract, but that the Undertaker comes in Aid of the Credit given by the Contract to the Party, the Undertaking will be within the Statute. And they also agreed the Case put by Darnell, and further said, If two come to a Draper, and one of them says, Let this Person have so much Cloth, and I'll see you paid; there the Sale is to the Undertaker only, tho' Delivery be to another by his Appointment; but if Contract be made with A. and the Vendor scruples to let the Goods go without Money, and B. comes to him, and desires him to let A. have the Goods, and undertakes that A. shall pay him, that will be a Promise within the Statute: So the whole Question will be, Whether the Plaintiff had any Remedy upon the Contract against J. S?

As to the Words in Stat. [Default of another.]

And Darnell insisted on it, That there is a Remedy upon the Bailment against J. S. by Contract in Law.

S f f

But

That there is
no such Thing
as a Contract
in Law.

But per Holt and Powell. There is no such Thing as a Contract or Promise in Law, tho' there be such Expression in some Books.

But at another Day they declared, That upon Conference with the other Judges, they had great Debate, and great Variety of Opinions in this Case, and that many thought it out of the Statute; for this Reason, That the Horse was let out wholly upon the Credit of the Defendant, that it should be redelivered; but we (says he) of this Court are unanimously agreed, that it is within the Statute; for it is an Undertaking for the Act, and to make good the Default of another. And where it has been objected, That if so be the Party did not redeliver him, the Plaintiff had no Remedy against him upon the Contract, but only in Trover and Conversion upon the subsequent Tort in Case of Demand and Refusal, and therefore they did not bring him within the Meaning of the Statute, for it is a Remedy accruing from a Wrong after the Contract; but there is a Way to charge him upon the original Delivery or Bailment, for the Bailment is such as in its Nature required a Redelivery, and if Bailee will not redeliver the Thing bailed, the proper and only adequate Remedy is an Action of Detinue against the Bailee: Therefore this Promise of the Defendant's, that J. S. should redeliver the Horse bailed, for which there lies a Remedy against the said J. S. upon the Bailment, is a collateral Promise, and therefore a Promise to answer for the Act and Default of another, and by Consequence within the Statute. So if two come to a Shop, and one of them contracts for Goods, and the Seller does not care for trusting him, whereupon the other says, Let him have them, and I'll undertake he shall pay you; that is an Undertaking for the Act and Default of another, and within the Act: But if the Promise be, I will see you paid, or I will be your Paymaster, it is otherwise.

Verdict set
aside.

Et per tot' Cur', Verdict set aside.

2 Salk. 626.
S. C.

Davy *versus* Salter.

Error of Judgment in C. B.
Vide ante
148, 159, 196.

Error from the Common Pleas of a Judgment by Default there; and the Error insisted on was, That the Writ of Enquiry was executed after it was returnable. It was returnable in Tres Sept. Trin. which is a Sunday of Necessity, and was in that Year the 13th of June, and the Writ of Inquiry is returned to have been executed the 14th of June, which is the Day after, when the Sheriff's Authority by the Writ was determined. And the Court must take judicial Notice of the Commencements and Return-Days of all Terms, as well fix'd as moveable, and this they cannot do without likewise taking Notice of the Days of the Month on which these Days fall. You must take Notice of the Commencement of Easter Term, which must be by taking Notice of Easter-Day, on which that depends; and Easter-Day

Easter-day is the first Sunday after the Full Moon next after the 21st of March, and if that Full Moon happens on a Sunday, Easter shall not be till the Sunday after; by the same Reason you will take Notice of Trinity Term, its Beginning and Returns, and that Tres Sept' Trin' must be on Sunday, and what Day of the Month that Sunday is, and you will find it on the 13th of June this Year, of which this Judgment is: And Gage's Case, as in Co. Ent. 252. Mod. 402. 1 Roll 595. were quoted, and strongly relied on.

Eyre contra. That the Court cannot take Notice of the Day of the Month: 1 Cro. 275. Jo. 300. 1 Roll. Abr. 595. Yelv. 140. where held, That the Court shall not take Notice even of Fixed Feasts.

2. He urged, That Tres Trin' in Law was not a Day of Return, or at least that the Sunday being not a Dies Juridicus, should not be reckoned, and it then would be well, for a Writ may be executed on the Day of its Return; and for this Reason the Essoins are kept on the Monday: And the Reason seems to be, that when that Sunday is no legal Day, the Monday shall succeed in its Place; and in the Common Pleas they always take the Monday to be in Mensen Pasch'. If the Mife be join'd on the meer Right where the Appearance must be on the first Day, it must be, that the Monday is the first Day, or else the Party could not save himself: And this seems consonant to Reason, and the first Institution of the Thing; for it would be absurd to appoint a Day for Appearance which the Party could not possibly appear at, and that Sunday never was a Juridical Day; Vide Britton, c. 5. and this is the more reasonable, for that the first Return is Crast' Trin'; and in 2 Cro. 16. the Monday is said to be the Day of Tres Trin'; in 1 Cro. 11. the same, viz. the Dies Lunæ is the Day of Tres Trin', and all Returns of Writs adjourn'd to that Day.

1 Danv. 683.

2 Danv. 254.

Farell. 17.

R. That the Court cannot take Notice of the Day of the Month.

Ld. Raym. 4,

281, 870,

1142, 1557.

That Sunday shall not be reckoned, &c.

In Mens' Pasch' is Monday in C. B.

That Sunday

never was a

Juridical Day.

See Carth. 504.

Spiritual Pro-

cesses may be

served on Sun-

day; and so it

seems may any

temporal Pro-

cesses besides

arresting the

Person, &c. Q.

Obj. That Sun-

day is in the

Quarto Die

post.

R. That all

Octaves and

Quindena's are

not inclusive.

Obj. The Sunday is always reckon'd in the Computation of the Quarto Die post; and the 1st and 4th Day are taken inclusive.

Answ. All the Octaves and Quind' are not inclusive of the 1st and 8th, or 15th; as in Easter Term, Quinden' Pasch' does not take in Easter-day, but is exclusive of it; and so is Octab' Trin' of Trinity Sunday, as is apparent from the Entries, which are, a Die Pasch' in quind' Dies, a Die Trin' in 8 Dies; and [a] is always exclusive of the Terminus a quo, and it is very odd to include the Day of Return one of the four Days of the quarto Die post; for post is likewise exclusive.

Then all Judgments must refer to the first Day of Term; and if so, this Judgment must relate to a Sunday, except it be agreed that Monday shall succeed in its Place. If Sci'fa' be returnable in Common Pleas, Tres Trin', the Entry is, Et modo ad hunc Diem scilt' Diem Lunæ; for if it be understood Sunday it will be void.

Holt, Ch. J. If the Sunday happen to be the Quarto Die post, it must of Necessity go to Monday, because it cannot be kept on the Sunday, and so of Essoins; but all Quindena's and Octaves are inclusive of the 1st and 8th, or 15th Day: So Octab' Hill' is the 20th of

C. J. That all

Quindena's &

Octaves are

inclusive.

of January, and Hill' Day is the 13th; and here, where we proceed de Die in Diem, we never enter a Die S. Trin' in 8^o or Quind' Dies, but Die Lunæ, &c. post Festum: And as to the Relation of Judgments, that is for Necessity to the first Juridical Day, which is Monday, Sunday being none, and the Calendar is settled by Law, and Part of it, and the Moveable Feasts by the Calendar, though not altogether according to the Rule in it; and if a Writ be returnable Quind' Pasch', we must sure take Notice of it, and so must all those whom it concerns: Suppose upon Forfeiture of Issues, or saving, or keeping of Days in a real Action; and Gage's Case, and that of Fish and Brockett, in Pl. 266. are unanswerable: And the Monday is not the Tres Trin', but the Sunday is it, tho' in Cases of Necessity it be kept on the Monday: And some Years ago the Midsummer-day happened to be on Wednesday, which should have been the last Day of the Term; but being a Dies non, upon great Consideration the Day following was kept: By the Statute of 22 H. 8. c. 21. Trin' Term is to begin the Morrow after Corpus Christi Day, and therefore we don't come here the 4th Day: And he quoted the Trial at Nisi prius, which was set aside, because it was Die Lunæ in Mensen Pasch'. And tho' [a] be generally exclusive, and that the Entry in the Common Pleas in all Cases of Original be a Die Lunæ, &c. in all Proceedings on Original, yet it is taken inclusive.

The Calendar settled by Law, and Part of it. Vide ante 41, 81, 160, 196.

1 Inst. 135. a. That Sunday is the Tres Trin'. Ante 148, 159 & 196.

When Trinity Term is to begin. Cal. temp. An. 120, 143. Ld. Raym. 353, 4, 281, 480, 1557.

That it is fit to settle this Matter fully.

Powell. Gage's Case is very strong against you; but I believe there be many other Cases contrary, therefore it is fit to settle it fully; and the Practice of Common Pleas will be a good Guide in a Writ of Error from thence: And in Cases of Necessity, Things are done on the Monday, as in Appearance in a Writ of Right, where Law allows not of a Quarto Die post: And Sunday never was nor is a Dies Juridicus; but there is no Necessity in this Case.

Cur' adv. vult.

Parker *versus* Clerk.

Parish-Clerk sues Churchwardens in spiritual Court for Money &c. Vide of Parish Clerks. Godol. Abr. 167, 165, 192. 2 Roll. Abr. 227, 234, 286, 287. 2 Brownl. 38. Cro. Jac. 670. Mar. 101. Vi. Ben. 142, 304. Farell. 137. S. C. Ld. Raym. 703, 1507, 1205. Cal. temp. W. 3. 9, 583, 132, 206, 207. Cal. temp. An. 5, 221, 261. Cal. temp. Mac. 12, 439, 440. 1 Mod. Cal. in L. & Eq. 194. 1 Wms. 476. Stra. 776, 942, 1108, 187.

SUIT was in the Spiritual Court by a Parish-Clerk against the Churchwardens for so much Money, by Custom due to him yearly, and leviable by them upon the Parishioners: And now a Prohibition was moved for upon Suggestion of no such Custom. To which it was objected, That if there was no such Custom, they should have pleaded it below; and if without receiving that Plea they would proceed, then would be the proper Time for a Prohibition; but they came for a Prohibition too late, viz. after Sentence.

Where after Sentence, Prohibition lies, &c. Vide Show. 158, 172. Farell. 148. Hob. 79. Post 253. Ante 11.

Holt, Ch. Just. I know no Case where one comes too late for a Prohibition after Sentence, but that of suing one out of his Diocese: Indeed, if a Suit be there for a Modus, and the Defendant pleads Payment, he comes after too late to plead, or suggest that there is no Modus, because he has admitted one by Pleading a Payment. But here

2 1 Sid. 332, 65. Win. 8. 1 Ro. R. 80. 2 Ro. 318.

here the Matter lies; Here is a Duty not Spiritual but Temporal, and to a Temporal Person, for such is a Parish-Clerk; and therefore we grant Mandamus's to restore him to his Place: And this Duty is founded upon a Custom; and if there be such a Custom, he is not without Remedy at Law; for he may have Case for not making a Rate and levying; or if they do levy it, and not pay him, he may have an Indebit' for Money received to his Use. But alii dubit', looking upon the Clerk to be an Ecclesiastical Person, and in inferior Orders, and that as such, he might sue in the Spiritual Court for a Stipend or Pension: And a Diversity was urged from the Bar in the Point of a Spiritual Person's suing in the Ecclesiastical Court for a Pension, viz. that he might well do it only in Case of Pensions originally granted, or confirmed by the Ordinary; but that where a Pension does not originally commence by the Act of the Ordinary, there it cannot be sued for in the Spiritual Court: As if one should grant an Annuity to a Person, he cannot, as was said, sue for it in the Spiritual Court; and for this was quoted Cro. Eliz. 675. Colier's Case.

C.J. That this is a Duty temporal.

2. If the Clerk be an Ecclesiastical Person.

Vide 2 Inst. 487.
Cro. Jac. 217, 269, 666.
Cro. El. 675, 810.

It will be hard to make the Clerk a Spiritual Person, &c.

But per Holt, Ch. J. There is no Diversity; but what sticks with me is, whether they have original Jurisdiction here; which without Doubt they have not, if they don't make the Clerk a Spiritual Person, which will be hard to do: And if they have not Original Jurisdiction, one is never too late for a Prohibition. Vide ante 152. in pede.

And per Cur', Case will certainly lie against the Churchwardens upon such a Custom: As if Bailiff, or Reeve of a Manor, be bound by Custom to collect Money, Case will lie against him for not doing it, and Indebit' after it is received. Quare quid inde venit.

Per Cur', Case and Indebit' will lie.

Tilsden versus Parfriman.

1 Salk. 213, 345, S. C.

Tilsden being now in Newgate upon a Warrant of a Judge, upon the Act against Prisoners escaping; and the Regularity of that Matter being now refer'd to Mr. Clerke to examine, it was reported to him, That Tilsden had been indebted to Parfriman, and in Prison of Marshal at his Suit, and had escaped; and being taken up by a Warrant, lay in Newgate. That after the said Parfriman and he came to an Agreement: Whereupon, upon Payment of a Sum certain in Hand, and a Promise to make other Payments hereafter, he consented to have him discharged out of Newgate: That after the said Tilsden not performing his Agreement, the said Parfriman endeavoured to get him arrested, but could not; but that he was arrested at Suit of another, and committed to the Marshal, who let him escape voluntarily; and after he paid that Plaintiff, but had no legal Discharge from him. Parfriman hearing of the new Arrest, goes to the Marshal, and asks him, If he had such an one in his Custody? Who answers, Yes: Whereupon he enters an Action against him in the Book that is kept in the King's Bench Office, and after gets him arrested by Process of the

T. in Newgate upon an Escape warrant ad Seftam P. Vide ante 21, 22, 63, 95, 154.

T. was after arrested, and in Cust Mar', &c. Ld. Raym.

353.

The Calendar
settled by Law,
and Part of it.
Vide ante 41,
81, 160, 196.

1 Inst. 135. a.
That Sunday is
the Tres Trin'.
Ante 148,
159 & 196.

When Trinity
Term is to
begin.
Caf. temp.
An. 120, 143.
Ld. Raym.
353, 4, 281,
480, 1557.

That it is fit
to settle this
Matter fully.

of January, and Hill' Day is the 13th; and here, where we proceed de Die in Diem, we never enter a Die S. Trin' in 8^o or Quind' Dies, but Die Lunæ, &c. post Festum: And as to the Relation of Judgments, that is for Necessity to the first Juridical Day, which is Monday, Sunday being none, and the Calendar is settled by Law, and Part of it, and the Moveable Feasts by the Calendar, though not altogether according to the Rule in it; and if a Writ be returnable Quind' Pasch', we must sure take Notice of it, and so must all those whom it concerns: Suppose upon Forfeiture of Issues, or saving, or keeping of Days in a real Action; and Gage's Case, and that of Fish and Brockett, in Pl. 266. are unanswerable: And the Monday is not the Tres Trin', but the Sunday is it, tho' in Cases of Necessity it be kept on the Monday: And some Years ago the Midsummer-day happened to be on Wednesday, which should have been the last Day of the Term; but being a Dies non, upon great Consideration the Day following was kept: By the Statute of 22 H. 8. c. 21. Trin' Term is to begin the Morrow after Corpus Cristi Day, and therefore we don't come here the 4th Day: And he quoted the Trial at Nisi prius, which was set aside, because it was Die Lunæ in Mensen Pasch'. And tho' [a] be generally exclusive, and that the Entry in the Common Pleas in all Cases of Original be a Die Lunæ, &c. in all Proceedings on Original, yet it is taken inclusive.

Powell. Gage's Case is very strong against you; but I believe there be many other Cases contrary, therefore it is fit to settle it fully; and the Practice of Common Pleas will be a good Guide in a Writ of Error from thence: And in Cases of Necessity, Things are done on the Monday, as in Appearance in a Writ of Right, where Law allows not of a Quarto Die post: And Sunday never was nor is a Dies Juridicus; but there is no Necessity in this Case.

Cur' adv. vult.

Parker *versus* Clerk.

Parish-Clerk
sues Church-
wardens in spi-
ritual Court
for Money &c.
Vide of Parish
Clerks.

Godol. Abr.
167, 165, 192.
2 Roll. Abr.
227, 234, 286,
287.

2 Brownl. 38.
1205. Caf. temp.
439, 440.

SUIT was in the Spiritual Court by a Parish-Clerk against the Churchwardens for so much Money, by Custom due to him yearly, and leviable by them upon the Parishioners: And now a Prohibition was moved for upon Suggestion of no such Custom.

To which it was objected, That if there was no such Custom, they should have pleaded it below; and if without receiving that Plea they would proceed, then would be the proper Time for a Prohibition; but they came for a Prohibition too late, viz. after Sentence.

Cro. Jac. 670. Mar. 101. Vi. Ben. 142, 304. Farell. 137. S. C. Ld. Raym. 703, 1507, 1205. Caf. temp. W. 3. 9, 583, 132, 206, 207. Caf. temp. An. 5, 221, 261. Caf. temp. Mac. 12, 439, 440. 1 Mod. Caf. in L. & Eq. 194. 1 Wms. 476. Stra. 776, 942, 1108, 187.

Where after
Sentence, Pro-
hibition lies,
&c.

Vide Show.
158, 172.
Farell. 148.
Hob. 79.
Post 253.
Ante 11.

Holt, Ch. Just. I know no Case where one comes too late for a Prohibition after Sentence, but that of suing one out of his Diocese: Indeed, if a Suit be there for a Modus, and the Defendant pleads Payment, he comes after too late to plead, or suggest that there is no Modus, because he has admitted one by Pleading a Payment. But here

2

1 Sid. 332, 65. Win. 8. 1 Ro. R. 80. 2 Ro. 318.

here the Matter lies; Here is a Duty not Spiritual but Temporal, and to a Temporal Person, for such is a Parish Clerk; and therefore we grant Mandamus's to restore him to his Place: And this Duty is founded upon a Custom; and if there be such a Custom, he is not without Remedy at Law; for he may have Case for not making a Rate and levying; or if they do levy it, and not pay him, he may have an Indebit' for Money received to his Use. But alii dubit', looking upon the Clerk to be an Ecclesiastical Person, and in inferior Orders, and that as such, he might sue in the Spiritual Court for a Stipend or Pension: And a Diversity was urged from the Bar in the Point of a Spiritual Person's suing in the Ecclesiastical Court for a Pension, viz. that he might well do it only in Case of Pensions originally granted, or confirmed by the Ordinary; but that where a Pension does not originally commence by the Act of the Ordinary, there it cannot be sued for in the Spiritual Court: As if one should grant an Annuity to a Person, he cannot, as was said, sue for it in the Spiritual Court; and for this was quoted Cro. Eliz. 675. Colier's Case.

C. J. That this is a Duty temporal.

2. If the Clerk be an Ecclesiastical Person.

Vide 2 Inst. 487.
Cro. Jac. 217, 269, 666.
Cro. El. 675, 810.

It will be hard to make the Clerk a Spiritual Person, &c.

But per Holt, Ch. J. There is no Diversity; but what sticks with me is, whether they have original Jurisdiction here; which without Doubt they have not, if they don't make the Clerk a Spiritual Person, which will be hard to do: And if they have not Original Jurisdiction, one is never too late for a Prohibition. Vide ante 152. in pede.

And per Cur', Case will certainly lie against the Churchwardens upon such a Custom: As if Bailiff, or Reeve of a Manor, be bound by Custom to collect Money, Case will lie against him for not doing it, and Indebit' after it is received. Quære quid inde venit.

Per Cur', Case and Indebit' will lie.

Tilsden *versus* Parfriman.

1 Salk. 213, 345, S. C.

Tilsden being now in Newgate upon a Warrant of a Judge, upon the Act against Prisoners escaping; and the Regularity of that Matter being now refer'd to Mr. Clerke to examine, it was reported to him, That Tilsden had been indebted to Parfriman, and in Prison of Marshal at his Suit, and had escaped; and being taken up by a Warrant, lay in Newgate. That after the said Parfriman and he came to an Agreement: Whereupon, upon Payment of a Sum certain in Hand, and a Promise to make other Payments hereafter, he consented to have him discharged out of Newgate: That after the said Tilsden not performing his Agreement, the said Parfriman endeavoured to get him arrested, but could not; but that he was arrested at Suit of another, and committed to the Marshal, who let him escape voluntarily; and after he paid that Plaintiff, but had no legal Discharge from him. Parfriman hearing of the new Arrest, goes to the Marshal, and asks him, If he had such an one in his Custody? Who answers, Yes: Whereupon he enters an Action against him in the Book that is kept in the King's Bench Office, and after gets him arrested by Process of the

T. in Newgate upon an Escape warrant ad Sectam P.
Vide ante 21, 22, 63, 95, 154.

T. was after arrested, and in Cust' Mar', &c.
Ld. Raym. 353.

Obj. That the
1st Discharge
was no Dis-
charge of the
first Action, &c.

the Court of King's Bench, keeps him in Custody thereupon till he got a Judge's Warrant, whereby he was carried to Newgate; the Commitment by this Warrant is what is complained of: And tho' it was urged by Serjeant Darnell, that the Discharge out of Newgate was no Discharge of the first Action for Escape from which he was committed to Newgate; for the Plaintiff upon the Escape out of the Marshalsea of the Marshal, had his Election to take the Party upon a new Action, or upon a Warrant now by the late Act, or to have an Action of Escape against the Marshal, and the taking up upon a Warrant will be no Discharge to the Marshal; therefore the first Action remains still undischarged, and the Marshal may take him up thereupon; and if so, he is now wrongfully at large, and may be taken up by a Judge's Warrant, as has been done.

Per Cur', Ta-
king up an
Escaper by
Warrant, is no
new Imprison-
ment, &c.
Vide ante 95,
154.
5 Mod. 232,
413.

Prisoner, how
to be dischar-
ged if no De-
claration in
two Terms.
1 Salk. 213,
214.

But upon an
Escape, he may
be arrested.

If Marshal suf-
fer one to be in
and out, and he
is discharged,
and then re-
turns again,
&c.

But per Cur', If one in Custody of the Marshal escape, and is taken upon a Judge's Warrant, that is no new Imprisonment, but a Continuance of the old; and a Discharge of that Commitment will be a Discharge of the first; but if he had escaped out of the County Gaol without Consent of the Gaoler, there the Marshal might retake him: As if one be in Custody of the Marshal for Debt, and escapes, and after the same Plaintiff takes him up upon another Debt, and lets him go again, yet the Marshal may retake him for the Escape.

2. The Court agreed, That if a Man be in Custody two Terms without a Declaration, he shall be discharged upon filing common Bail; and the Way to charge one in Custody in Term-time, is by filing a Bill against him, and delivering a Declaration to the Turnkey; after which he must lie two Terms, as to that Party, before he can be discharged on common Bail; but in Vacation, there is no Way but to make an Entry in the Book that is kept in the Office of a Remanet in Custod' Mar' ad Sect. de, &c. and that is sufficient to charge him; but to make that suffice, the Party must be actually in Gaol, and not escaped; for the Reason why such Entry is allowed good, is, because of the Necessity of the Thing, the Party having no other Way to charge him when he is in actual Custody: But upon an Escape there is not that Necessity, for he being at large, may be arrested: Indeed if the Marshal will own him to be in his Custody who is not so, that shall conclude him, and subject him to an Escape; but such Confession of the Marshal ought not to be conclusive to any but himself, and it is against a Principle of the Law to charge a Man in Custody, who is not in Custody, and the Mischief of it would be very great: And this cannot be call'd taking Advantage of the Party's own Wrong; for his escaping out of Prison, where he is in Custody at the Suit of A. cannot be any Wrong to B. tho' he be thereby deprived of the Advantage of charging him in Custody. Indeed, if Marshal suffer one to be in and out at Times, and during such Time he is charged by a Remanet, &c. tho' he were actually out of Prison at that Time, yet if he returned in again, that will be quasi a Continuance of the first Imprisonment: And by such Return he may have Notice of the Charge, and the Meaning of the Statute, whereby the

the Marshal is to acknowledge what Prisoners he has, is only in
ord er to charge himself.

And per Cur', The second Imprisonment in Newgate is irregular; but we cannot take Notice of any Thing till the Warrant be returned: And the Question will be, Whether we will relieve on Motion, or put you to your Audita querela?

That this second Imprisonment is irregular, but the Warrant must be return'd before Remedy had.

Ld. Raym.

1174. S. C.

1 Salk. 359.

S. C.

Vide Ib. 12,

& 358.

Vide 2 Inst.

Ante 150, 191.

Post 263, 307.

Error of Judgment on an

Indictment for

not repairing,

&c.

Obj. It did not

appear the

Bridge was in

alta regia via.

Vide Pal. 389.

2 Keb. 178.

1 Vent. 208.

Ld. Raym.

725, 792.

804, 856,

1175, 1249.

Cas. temp.

W. 3. 13,

198, 409.

Domina Regina versus Saintiff.

AN Indictment against him for not repairing quendam Commu-
nem pontem situm in quadam communi semita pedestri, leading
from such a Place to such a Place; which he was bound to repair
ratione Tenuræ, and which he suffered to be valde ruinof & in magno
decasu, &c. ad commune nocumentum omn' ligeor' D'næ R'næ illac
transeun'; and Judgment given thereupon at the Quarter Sessions,
of which Error was now brought.

And now Eyre objected to the Indictment, That it did not lie; for
it did not appear that the Bridge was in alta regiâ viâ, as it ought to
have been per luy: For it was a Term of Art not to be supplied by
any other Words, no more than the Words, Murdravit, Burglariter,
&c. in Indictments of Murder or Burglary; Staundt. 96. Dyer 304.
2 Inst. 701. Then if it does not appear to be a Highway, it must be
taken to be only a private one, for the not Repairing whereof an
Indictment does not lie. Of the other Side, in Maintenance of the
Judgment, was quoted West's Precedents 147, 156, 346.

And Eyre further urged, That the Power given to Justices of
Peace in this Case, is by the Statute of 22 H. 8. c. 5. which men-
tions, that they shall judge of Decay in Bridges in Highways; ideo
they ought to shew that this is such a Bridge, and so pursue their
Authority.

Holt, Ch. J. An Indictment lies not for not Repairing a Bridge,
except it be in a Highway, as Mr. Eyre will have it; but the Word,
Highway, is the Genus of all publick Ways, as well Cart, Horse, and
Foot-way, and yet Indictment lies for any one of these Ways, if they
be common to all the Queen's Subjects, having Occasion to pass
there; that is, if it be a Foot-way only common to them all, or Horse
and prime Way; and these are not altæ regiæ viæ, for that is the great
Highway common to Cart, Horse and Foot that please to use it: So
that the Term of Alta regia via, is not so necessary; and if there be a
common Foot-way for all the Queen's Subjects, if it be in Decay, an
Indictment must of Necessity lie for it, because Case will not lie with-
out a special Damage: Then as to the Authority of the Justices, they
have a Power by the Statute of 1 Ed. 3. c. 16. by which they are crea-
ted, to inquire of all publick Nusances; and if this be a publick Bridge,
the

C. J. It lies not,

except the

Bridge be in

a Highway;

i. e. in a pub-

lick Way.

That the Term

Alta regia via,

is not so neces-

sary.

Vi. 1 Hawk.

201.

Publicus is of a wider Extent than *Communis*. Vi. Fleta 174. Aufow. Pop. 66. *Ideo* fit to see Precedents, &c.

the suffering of it to be in Decay is a publick Nuisance, and so within their Jurisdiction: So all that sticks with me is the Manner of laying it; for the Word, Commune, does not ex vi Termini import that it is common to all the Queen's Subjects, as it ought to do to maintain an Indictment. And one of the Precedents produced has the Word Publicus, which is of wider Extent than Communis, for there is Common for two, three, or more; and it will be hard to understand the Word, Common, to be universal, to charge a Man's Freehold. And without Doubt the Conclusion will not help it, if so much be not expressly charged in the Premises. And here it is not said to whom it is common, ideo very fit to see Precedents before we determine it.

1 Salk. 276. S. C.

Trevivan *versus* Lawrence & al. Pasch. & Mich. 3 Annæ.

Ld. Raym.

1036, 1048.

S. C.

Vide ante 134.

2 Keb. 47, 55,

181, 415.

3 Keb. 212,

768.

Post 304.

In Ejectment

Special Ver-

dict that a Sci'

fa' was by an

Admr. in Trin'

Term, but no

Judgment till

Mich' Term.

See 2^d Lutw.

1267.

3 Lev. 300.

IN Ejectment by Administrator of Lands in Cornwall, this Special Verdict was found, That one S. R. was seised of the Premises in Fee, and he being so seised, the Plaintiff's Intestate did sue him in Debt upon a Bond in such a Court in Westminster, and that in that Suit Judgment was given against the said S. R. in Mich. 1656. That in the 13th Year of the late King a Sci' fa' was brought by the now Plaintiff against the now Defendant, as Certenant of some of the Lands whereof the said S. R. was seised at that Time or since, and that the Defendant being summoned, did appear, and plead Nul tiel Record, and Day given to produce the Record, at which Day a Judgment of Michaelmas Term was produced, and Judgment and Award of Execution for Plaintiff thereupon; but that the Sci' fa' brought by the Plaintiff did recite a Judgment of Trinity Term 1656. And upon this Award of Execution an Elegit was taken out by the Plaintiff, and Lands extended, and in Ejectment to get the Possession, the Judgment given in Evidence was that of Michaelmas 1656. And for the Variance between the recited Judgment in the Sci' fa' and that given in Evidence, the Jury doubted.

See 1 Saund. 37.

Eyre for Plaintiff. I agree the general Rule, That who makes Title under Execution, must shew a Judgment on which it is grounded; but here we need only to shew the Judgment on the Sci' fa', for tho' it be upon a judicial Writ, yet it is considered as an Action, and may be released by that Name. Lit. §. 503, 504. If Judgment be against one, the Attorney for Plaintiff may sue Execution by Vertue of his first Warrant, yet a Warrant in the original Cause does not empower an Attorney to appear to a Sci' fa' upon a Judgment in that Cause, or the Attorney for Plaintiff to sue out a Sci' fa'. Cro. El. 154. Release of Action is a Release of Sci' fa', but a Release of Action is no Release of Execution; therefore the Sci' fa' is no Execution, nor the Judgment upon it more than a bare Award of Execution.

Brotherick contra. A Judgment on a Sci. fa. is no new Judgment to affect the Land in this Case, but is only an Application of an ancient Lien on the Land, 2 Keb. 499. And this Judgment does not alter the Nature of the Duty, nor create a new one. Vide 3 Lev. Micoe *versus* Morrice. Indeed an Officer that justifies by Vertue of a Writ need not shew a Judgment, but the Party must always do it. And per luy, a Sci. fa. lies not upon a Judgment on Sci. fa.

Oby. Judgment on Sci. fa. is no new Judgment, &c. Owen 134. Bridgm. 72. Hetl. 150.

Holt, Ch. J. If Sci. fa. recite a Judgment of Trinity Term in Debt, whereby all the Defendant's Lands whereof he was then, or at any Time since, seised, are bound, and the Tenants returned plead Nul tiel Record, and a Judgment of Michaelmas Term be produced, no Doubt that is a Failer of Record. But the Question is, when the Record is produced, and Judgment thereupon, whether the Defendants be not thereby concluded for ever? For to admit them to controvert it now, would be to falsify the Point tried, and that cannot be even by Issue in Tail: As if in a Writ of Entry a Recovery be against the Ancestor of Issue in Tail, the Issue cannot falsify it in the Point tried, but he may say that his Ancestor omitted the giving such Things in Evidence which he can now give. And one may have a Sci. fa. upon a Judgment on a Sci. fa. and for this he remembered the Case of *O'Brien versus Ram* about 15 Years ago in this Court: A Judgment against a Feme Sole, who after took Husband before Execution, and then a Sci. fa. was sued against both, and Judgment thereupon, and an Award of Execution against both, and then the Wife died, and then a new Sci. fa. is brought against the Husband Survivor, and adjudged it lay. And another Case since likewise in this Court: Feme Sole obtained a Judgment, and before Execution took Husband, and then they brought a Sci. fa. to have Execution, and had Judgment thereupon, and Award of Execution: The Wife dies, and the Husband surviving had another Sci. fa. and held well. And he quoted the Case of *Gilbert and Bragg*, Anno 1655. Judgment in Debt against Tenant in Tail, who died, and after Sci. fa. against his Issue, who return'd warn'd, made Default; though the Lands in Tail were not liable, yet he is concluded for ever, and this is grounded on the Book of 27 Ass. And a Jury cannot find against an Estoppel in a Point tried, and so wherever there is an Estoppel that affects the Interest of the Land, the Jury cannot find against it. It is true, if you come to special Pleading, and it be reduced to a Point in Pleading, and the Party then will not take Advantage of it by relying thereupon, but will leave it at large, the Jury is not estopp'd, but may find the Truth. As suppose in this Case, Plaintiff had declared on a Judgment in Trin. 1656. and the Defendant had pleaded Nul tiel Record; if he will join Issue that there is such a Record, he is gone, because the Truth will be against him; but if he will say that there was a Sci. fa. taken out against the Defendant at such a Time, reciting such a Judgment as is now shewed in his Declaration, and that the Defendant pleaded Nul tiel Record,

Resp. per C. J. That there was a Failer of Record, but that cannot be controverted now to falsify the Point tried.

3 Mod. 186. S. C. Carthew 30. and Comberba. 103. See Cro. Car. 150, 164.

3 Keb. 170,
324.
1 Keb. 95,
113.

Vide Hob.
207.

When an
Estoppel runs
upon the
Land, it al-
ters the Inter-
est of it.

1 Salk. 276.
2 Mod. 115.
2 Keb. 364.
Raym. 21.
1 Lev. 43.
Ld. Raym.
590, 729.

Judgment *pro*
Quer' upon
the Case as
here put.

All the Te-
nants here
but one are
estopp'd, &c.

And he too,
if he does not
shew a Title
paramount.

cord, and that was found against him the Defendant, and conclude by relying on the Estoppel, he is safe, and the Defendant cannot offer any Thing against it. So if a Demise be pleaded by Indenture, and the other will say, Nil habuit in Tenementis, and the Plaintiff will say, Habuit in Tenementis, he thereby waives the Matter of the Estoppel, and leaves it at large, and the Jury may find the Truth; but if he had said, that it being by Deed under his hand and Seal, he ought not to be admitted against his Deed, to aver that he had nothing, the Truth could not be inquired into; but if the Issue were upon Nil debet, where the Point don't come in Pleading, as in Debt for Rent where the Demise is by Deed, the Party cannot give Evidence of Nihil habet in Tenementis, nor the Jury inquire of it: And when an Estoppel runs upon the Land, it alters the Interest of it; for if a Man by Deed indented make a Lease of Dale, reserving Rent, in which at that Time he has nothing, and after he purchases Dale, and bargains and sells it to a Stranger, the Bargainee shall hold it liable to the First Lease, and coming under him that made the Lease, shall be estopp'd to say, that Bargainor had nothing to let in the Premises at the Time of the Lease made; for this Estoppel runs upon the Land, and alters the Interest of it. And this Case having been thus spoke to in Easter-Term, pended in Consideration till this Term: When per tot' Cur', Judgment was given for the Plaintiff, the Ch. Just. putting the Case shortly thus: Sci' fa' by Administrator upon a Judgment in Trinity Term, the Record being in Truth of that Term, but no Judgment till Michaelmas Term; and the Defendants being all except one return'd, plead Nul tiel Record; and the Record of Michaelmas Term produced, and Judgment on the Sci' fa', and an Award of Execution, Elegit taken out, and an Extent thereon, and an Ejectment brought to get Possession; and now it is found out, that there was no such Judgment as the Sci' fa' recited: What then? All these Persons are estopp'd; for now they are not bound of the Plaintiff's Side to give the Record of the original Judgment in Evidence, but only the Award of Execution on the Sci' fa' for being all except one return'd Certe-nants, they are all except him estopp'd thereby from saying, that there was no such Judgment; and as to him too, he is estopp'd if he does not shew a Title paramount the Judgment on the Sci' fa', for this is an Estoppel that works upon the Interest of the Land; and it is like a Judgment against one who is afterwards disseised, or a Sci' fa', against an Issue in Tail, who makes a Default, or pleads other Plea which is found against him, whereby Execution is awarded, he shall not after be admitted to say, that his Ancestor was Tenant in Tail, and he Heir to the Intail; and even upon the Estoppel the Plaintiff in the Judgment shall maintain an Ejectment: As if a Man make a Lease by Indenture of Land which is not his, and after purchases it, that Lease shall bind him, his Heirs and Assigns; and an Estoppel that affects the Interest of the Land, shall run with it to whoever takes it; and none that are Parties to, or Claimants under, this Recovery, shall falsify it.

Judic' *pro*
Quer'.

Judic' *pro Quer'*.

Fitz-

Fitz-Hugh *versus* Dennington. Antea 227. See 2 Salk. 585. Ld. Raym. 1094. S. C.

THIS Case being moved again, Broderick urged, That the Plea was naught, and therefore Judgment ought to be affirmed: We were to be made free at the End of seven or eight Years from the Date of the Bond, of the Company of Joiners, if we desired it; then the Election is ours, to be made free at the End of seven Years, or else at the End of eight; and this ought to be determined in some convenient Time before the End of seven Years, that the Obligor might have all Things ready to perform his Condition, which was to be at the End, that is, the last Day of the seventh Year: And how has the Obligor discharged himself by saying, That we have not requested him at the End of seven Years, or ever after before the Action brought? For a Request before the End of seven Years, in such convenient Time as the Obligor might have reasonable Time to get us made free at the End of seven Years, would be a good Request to entitle us to our Action; and that would not come within their Plea: Ideo Vid. Mod. 241. One bound to pay 20 l. or 20 Kine in a Month, at Election of the Obligee, there Obligee is to make his Election in convenient Time, that Obligor may provide what he chooses, and need not provide both: So if one be bound to make Obligee a Conveyance by Fine or Feoffment by such a Day at Election of Obligee, the Obligee is to determine his Election in convenient Time before the End of the Term; so here we were to make a Request in convenient Time before the End of seven Years, and they have not denied but we have so done; but only say, that we have not done it at the End of seven Years: 1 Lev. 68. 1 Ro. Ab. 374. Bridgm. 41. Aleyn 25. Style 49, 74.

That Judgment in this Case ought to be affirmed, &c.

Because the Election or Request ought to be determined within the 7 Years, &c.

Ante 227.

Vide 1 Cro.

179, 280.

2 Cro. 183,

652.

2 Bulst. 229.

Yelv. 66.

3 Bulst. 297.

Cal. temp.

W. 3. 455,

461, 462,

503, 413.

Cal. temp.

Mac. 519,

520.

Gilb. Eq.

Rep. 251,

252.

Holt, Ch. Just. The Obligor was to make him free at the End of seven Years, or eight Years, if thereunto requested; let us then go by Steps; Suppose it were to make him free at the End of seven Years if thereunto requested; and the Defendant pleads, That at the End of seven Years he was not requested; Why is not that a good Plea, for it is directly the Words of the Condition? But what shall be understood to have been meant by the End of seven Years? Whether after they are expired, or just at the End of them, so as he ought to be made free on the last Day of the seven Years? When a Man is to do a Thing by such a Time if requested, there if the Thing in its Nature may be done at the Time of Request, then the Request is to be made on the last convenient Part of that Time: As if a Man be bound to pay Money on Lady-day if requested, there the Request is to be on the last convenient Time before Sun-set of that Day, on which such a Sum may be paid; and if it were a Thing, the doing whereof required more Time, ought not that to come of the Plaintiff's Side in his Replication? And he took it clearly, that the Request here ought to have been on the last most convenient Time of the

C. J. This Plea is good, for it is directly to the Words of the Condition.

How the Request ought to be made.

The Condition being at the End of 7 or 8 Years, &c.

last Day of the seventh Year, and that it would come too late the next Day: As if Lessee covenant to leave all Things in good Order, and to vacate the Premises at the End of his Term, he must do it on the last Day, and cannot save his Covenant by doing it the Day after; for the End of a Thing is Part of that of which it is an End: But here the Condition being, at the End of seven or eight Years, if the Plea had been, that he did not request at the End of seven Years without going further, it had been bad.

Vide Farell.
143, 144.
Palm. 321.
If the Request had
been 2 or 3
Days after
the 7 Years.

Simile of a
Bond where
there is no
Demand at
such a Day
and Place.

A Difference
when a Time
is appointed,
and when
not.

Powell seemed to incline, that a Request in a Day or two after the seven Years, would be well; though he agreed, that in Demand for Rent it must be on the last convenient Time of the Day, because there the Law appoints a Place where the Request is to be made; but this must be a personal Request, and no Place appointed for it.

Holt, Ch. Just. In a Bond where there is no Demand for the Payment of Money at such a Day and Place, the Obligor must bring the Money the last Part of the Day to the Place; and if there be no Place appointed, he must seek him out if he be in England. If there be a Place appointed, and he has an Election to do the Thing on or before the Day, there he may give Obligee Notice to be there at the Day; and if he don't come, and Obligor is there and tenders, he saves his Bond: As if a Man be bound to enfeof one of Lands in York the last Day of November, and Covenantee stays here in Town; yet if the Covenantor does not go down and tender, he breaks his Covenant; and there is a Difference when a Time is appointed, and when not; for if Feoffment be to be made at such a Time if requested, there the Request is to be made at that Time; but if there be no Time fix'd, then the Request is to be made some reasonable Time before, and the Feoffment need not be made immediately thereupon: And the Case in 1 Roll. Abr. 443. for Payment of Money in Holland on Request, and a Request in England held good, is upon this Diversity.

2 Salk. 585.
The End of 7
Years must be
the last convenient
Time
of that Day.

The End of
the Day is
the last Instant
to many
Purposes, &c.

And now Holt, Ch. Just. and Powell: The End of seven Years must be the last convenient Time of that Day; and it is just like a Demand, which must be on such Time as the Thing may be done on. Indeed, if you had come and said, That the Defendant was a great Way off on the last Day, it had been something; and tho' the End of the Day be the last Instant of it to many Purposes, yet as to Acts to be done thereon, it is not so; for Day then is between Sun-rise and Sun-set, which is the Time for Men to work on; and therefore if a Demand be to be on Midsummer day, it may be good at Eight of the Clock in the Afternoon; whereas in December it must not be much after Four. Vide 2 Danv. 264.

1 Salk. 40,
44. S. C.

And Holt, Ch. Just. said, That it has been adjudged, that if one be born the First of February at Eleven a Clock at Night, and the Last of January in the one and twentieth Year, at one of the Clock in the Morning, he makes his Will and dies; yet such Will is good, for

for he then was of Age: And they all agreed, the Plea was good, tho' they differed about the Time on which the Request was to have been made, viz. whether on the last Day of seven Years, or after.

Per Cur', The Plea is good, and the Judgment was reversed.

Jud' revers' una Voce. 2 Sal. 585.

Leicester *versus* Foy.

PROHIBITION was moved for to stay a Suit by a Vicar in the Spiritual Court for Tithe-Milk, upon a Suggestion of a Modus, That the Inhabitants of that Place did, from such a Day in April till All-Saints, pay every Tenth Day's Milk skimm'd, and made into Cheese, and ratione inde were discharged of all Tithe-Milk.

2 Salk. 656.
S. C.
Hill. v. Vaux.
Prohibition to stay a Suit in Spiritual Court for Tithe-Milk, &c.

And Eyre against the Prohibition: It is true, making the Tithes of one Crop into Hay, will be a good Cause of Discharge of Tithe of Aftermoth; but he denied that it would be a good Modus to say, that for making the Aftermoth into Hay, they should be discharged of Tithe of the first Crop: And this Modus amounts to a Non decimando of the Cream.

Ld. Raym. 129, 359.

2. If this Modus does not amount to a Non Decimando of the Cream.

Contra was urged, Cro. El. 609. Moore 909. Modus to pay the 10th Cheese made from such a Time to such a Time in Lieu of all Tithe-Milk, and though it be but for Part of a Year, yet being what they are not bound to do, it is a good Discharge of Tithe-Milk all the Year: Vid. Latch 222. Raym. 277. And suppose it were to pay a Groat a Year for all Tithe-Milk, it would be well, and why not this? And though the Court did not like the Modus, as seeming very severe on the Vicar; yet to settle the Point which they thought of great Consequence, they granted a Prohibition directing them to declare forthwith.

Goddard *versus* Smith.

CASE for maliciously indicting him of Barretry without probable Cause, setting forth that he was debito modo inde Exonerat'; and at the Trial to prove the Declaration, he produced a Nolle ulterius Prosequi by Attorney General: And the Chief Justice doubting whether this Evidence maintained the Declaration, and strongly inclining that it did not, reserved it for the Opinion of the Court; and he said, That the Entering a Non Prof' was only putting the Defendant sine Die; and so far from discharging him from the Offence, that it did not discharge any further Prosecution upon that very Indictment, but that notwithstanding new Process might be made out upon it; and sure it is hard to allow a Man that gets off by a Non Prof' to maintain an Action for a malicious Prosecution. Indeed, if he had pleaded Not guilty, and the Attorney General had confessed it, that would have done; but he that gets off upon a Non Prof', does not

1 Salk. 21.
S. C.
2 Salk. 456.
Case for indicting the Plaintiff of Barretry, &c.
Vide ante 216.

Per Ch. J. 'Tis hard to allow a Man that gets off by a Non Prof', to maintain an Action, &c.
at Ld. Raym. 721.

X x x

8 Co. 58.

That this is
not so much
as a Nonsuit.

at all get off on the Merits of the Cause; and to maintain a Conspiracy, it is necessary to lay and prove an Acquittal: So in an Action for suing for a great Sum in order to hold to extravagant Bail, the Plaintiff must shew what became of that Cause, in order to maintain his Action; and so is my Lord Hob.----- But this here is not so much as a Nonsuit, for the Indictment stands still in force, and the Attorney General must make new Process upon it when he pleases: But he remember'd a Cause about twenty Years ago, in which Justice Wyndham directed for the Plaintiff on the same Point, and said, he thought it hard even at that Time.

That the
Word [*inde*]
non vult, &c.
goes not to
the Fact
charg'd.

Mountague urged, That it is Attornat' Dominæ Reginae ipsum, &c. *inde non vult ulterius Prosequi*; so he would have the *inde* to go to the Fact charged: Sed tota Cur' contra; for at most it can go but to that Indictment, and cannot be pleaded to a new Indictment for the same Offence, for a Nolle Prosequi at that Rate would amount to a Pardon.

That *inde acquietat'* goes
to the Fact
charged.

1 Sid. 420.
2 Salk. 456.
1 Vent. 33.
2 Keb. 521.
5 Mod. 394.
Caf. temp.
W. 3. 648,
654.
Caf. temp.
Mac. 216,
217, 218, 152, 153. 3 Wms. 499.

And per Powell, In all Cases of Conspiracy the *Inde acquietat'* goes to the Fact charged, and not to the Indictment; for if it went to the Indictment, if the Indictment were vicious, Conspiracy would lie; but that is not so, and colourable Proof would destroy this Action; and the Plaintiff by procuring this Nolle Prof', bars the Defendant from giving such Proof, and this Action cannot be maintained but upon Acquittal of the Fact charged by Verdict, Confession, &c. but he doubted of the Effect of a Nolle Prof' upon an Indictment, if it discharged the Indictment, or only put the Defendant without Day, and that notwithstanding the Attorney might issue new Process upon it.

When *Nolle Prof'* upon
Indictments
began, &c.
Caf. temp.
An. 56.

And Holt, Ch. Just. said, he had known it thought very hard that the Attorney General should enter Nolle Prof' upon Indictments, and that it began first to be practis'd in the latter End of King Charles the 2d's Reign, but that on Informations it had been frequently done; and he ordered Precedents to be searched if any were in Mr. Attorney Palmer or Nottingham's Time.

Harcourt, Master of the Office; There never has been any Proceedings after a Nolle Prosequi: And per omnes, In case of Barratry, Defendant upon Motion may have a Rule to have Articles delivered to him of the Instances, and the Prosecutor shall not give Evidence of any particular but what he has given Articles of; and if the Prosecutor gives no Articles, he shall give no Evidence.

Nolle Prof' a
Discharge of
an Informa-
tion.
Hard. 126,
153.
No Rule
made.

And at another Day, Holt, Ch. Just. declared, That in all King Charles the 1st's Time there was no Precedents of a Nolle Prof' on an Indictment: And Gould quoted a Case in Hardress, where it was enter'd on Record on an Information, and held it to be a Discharge of it. And the Court seemed all clear, that the Action did not lie, but gave no Rule.

Anonymus.

Baron and Feme came to acknowledge a Deed by them both in Court, and the Court ordered an Acknowledgment only of one of them to be enter'd viz. of the Husband.

Baron and Feme acknowledged a Deed in Court.

Ld. Raym. 521. 2 Vern. 61, 471, 591. Cas. temp. W. 3. 444, 609. Cas. temp. An. 196, 197. 3 Wms. 189. Cas. temp. Talb. 41, 42, 43, 164, 167.

Cockroft *versus* Smith.

Ante 230.
S. C.

Plaintiff declared as Clerk of the Court, The Defendant pleaded, that he was an Attorney of the Court, absque hoc that he is a Clerk of the Court. Plaintiff replies, That he is a Clerk of the Court, prout patet per Record inde residen' in Cur'; and prays the Record may be inspected: The Defendant would demur, and not join in the Issue; whereupon the Plaintiff signed his Judgment.

Plaintiff declared as Clerk of the Court, &c.

And per Cur', The Plaintiff is regular and made the Replication the true Way without desiring the Record to be brought in, and the Defendant forced to pay Costs to have the Judgment set aside.

Buxom *versus* Hoskins.

1 Salk. 52.
S. C.

Error was of a Judgment in Ejectment; and the Plaintiff not assigning Error, the Defendant in Error brought a Sci' fa' against him to have Execution, reciting a Judgment of two Mesuages, &c. whereas the Judgment in Truth was de uno Messuagio: And to this the Plaintiff pleads, Nul tiel Record; and now it was moved to amend it, and for Amendments of Sci' fa', were quoted 1 Roll. Abr. 197, 797. 22 Ed. 4. 6. 2 Keb. 175. 2 Cro. 372. Br. Abr. 20. sect. 20. 3 Cro. 760. 2 Sid. 7, 12.

Ld. Raym. 1057. S. C. Vide post 310. Plea, That he was an Attorney, *absq;* &c. Error of Judgment in Ejectment, and a Sci' fa' to have Execution, &c. 1 Mod. Cas. in L. & Eq. 313, 366. Stra. 401, 1165.

Holt, Ch. Just. This Sort of Sci' fa' is always to have Execution and the Writ thus mentions it; and the Plaintiff in Error may if he please plead to it a Writ of Error brought, and still depending, and assign Error.

And Holt, Ch. Just. cum reliqua Cur'. There is a Difference when the Writ is bad and vicious on the Face of it, and when it is good in the Frame of it, but not fitted to that particular Purpose; and all the Cases put of Amendment are of the first Kind; and some Colour there would be to amend in this Case if the Defendant had appeared and pleaded some other Plea, or had taken no Advantage of this Slip, so as the Proceedings would have been vicious without Amendment; but here he having taken Advantage of this Slip by pleading Nul tiel Record, shall we vitiate his Plea by an Amendment? And they agreed, That where-ever an Original was amendable, there a Sci' fa' would be so too; but said, That this would not be amended in an original Writ of

Post 286. That the Writ might have been amended, &c.

That the
Statute is to
cure only
Mistakes of
Clerks, &c.
Vide post
269, 270,
&c.
2 Show. 304,
305.

Et per Cur',
No Amend-
ment here.

of Error: Why? because it is a good Writ, and would well remove the Record it describes if any were; and quoted the Cases of Hamond v. Jersey, Pasch. 9 W. 3. and Thomson v. Crocker, 12 W. 3. And he said, If Formedon were made for 10 Acres, when the Instructions given are for 20, he doubted it could not be amended; for the Statute is to cure only Mistakes of Clerks, which would endanger the Reversing of Judgments, and not to alter Matters of Fact, by extending it further than it was before; and if this Writ be good in its self, but not ad idem, the Party may take out another Writ pending this; for if this Writ be not ad idem, it cannot be pleaded in Bar of the other; and against the Case in 2 Cro. 372. which Holt, Ch. J. said was a great Strain, was quoted, 1 Cro. 162, 163. and to amend this Writ, were quite to alter the Nature of the Writ after it is return'd and executed; which ought not to be.

Et per Cur', No Amendment. Vide postea.

Ward *versus* Apprice.

Indebit' ass'
by one Part-
owner of a
Ship against
another, &c.
Caf. temp.
W. 3. 16,
511, 517,
537.
Ld. Raym.
737, 340,
871, 920,
1285.
1 Mod. Caf.
in L. & Eq.
166, 242.
Stra. 820.
Motion, That
the Plaintiff
may produce
the Book at
the Trial,
&c.
Vide 1 Salk.
285.
2 Salk. 690.
Ld. Raym.
851, 927.

C. J. Plaintiff
ought to con-
sider if this
Action will
lie, &c.

A *Indebit' assumpsit* for Money received to the Plaintiff's Use: Broderick open'd this Matter at the Bar, That the Plaintiff, Defendant, and several others, were Part-owners of a Ship, and several Sums of Money were given by the rest of the Part-owners to the Defendant, for the Use of the Ship, for the Receipt whereof he had given a Note; that the Defendant had actually laid out the said Sums on the Ship and Voyage, and enter'd an Account of the Manner, &c. in a certain Book kept for the Affairs of the Ship; and then an Allowance thereof was enter'd likewise in that Book, which Book did belong to the Plaintiff, Defendant, and other Part-owners in Common, and now was in the Plaintiff's Possession; and upon this Matter made out by Affidavit, he moved, That the Plaintiff should either produce that Book at the Trial, or let the Defendant take Copies of such Entries and Allowances of Payment therein, as would be proper for him to make his Defence by; and said, this ought to be as well as if a Man bring an Action of Covenant upon an Indenture, and the Defendant swears he never had a Copy, you will not compel him to plead till the Plaintiff furnish him with a Copy, quod Cur' concedes: But here the Defendant should have taken up his Note upon the Account allowed, and you have entrusted him with the Custody of this Book; and if he has broke his Trust, you must seek for Remedy in Equity; and if an Action be brought by a Shop-keeper for Money due on Sale of Goods, we never enforce him to produce his Books; but if very slender Evidence be against him, then if he will not produce his Books, it brings a great Slur upon his Cause.

But Holt, Ch. Just. said, The Plaintiff would do well to consider, whether an *Indebit' assumpsit* would lie in this Case; and they would do nothing in it: They notwithstanding own'd it to be a mischievous Case, where many are Tenants in Common, or Copartners in a Trade, and have one common Book of their Transactions, and one has the Possession of it, and then brings Actions against the others.

Gree

Gree versus Sharp.

Ejectment upon Demise at such a Place in Devonshire, of Lands in another Vill in the same County, and the Ven' fa' was from the Place of the Demise; and at Cause's being carried down, and a View granted, there being a Jury, and a decem Tales: Now at the Trial a Panel was returned promiscuously of the Jury, and decem Tales; and now for this Irregularity, a new Trial was granted.

In Ejectment upon a Demise of Lands in another Vill, &c.
1 Keb. 179.
418.
3 Keb. 103,
245, 485.

And, 1. per Cur', In Ejectment the Venue ought to come always from the Place where the Lands lie, and not from the Place where the Demise is laid to be made; but that Fault is cured after Verdict by the Statute of Oxford.

Vide 2 Salk.
665, 545.

And per Holt, Ch. J. There is a Difference between the Practice of Common Pleas and this Court, in case of Views granted: If upon a full Jury in the Common Pleas the View be granted, and a Jury withdrawn, an Entry is made of this, and Process continued against the Jury, and a decem Tales awarded on the Roll, and there may be a Command of a Tales de Circumstantibus besides; but in the King's Bench, if a full Jury appear, and a View is granted, and a Jury be withdrawn, they take no Notice of it by Entry, but only grant a new Distringas against the same Jury, except the Jury withdrawn; but if there be a decem Tales awarded here, and a Jury appears, and a View is granted, there they must take Notice of it by Entry, and continue Process against the Jury, and decem Tales; otherwise the decem Tales would be discharged: And the Distringas of the decem Tales must be the same decem Tales returned upon the first Writ, and to mix the Persons returned on the principal Panel, and the decem Tales in the Panel that tries the Cause after the View, is irregular; therefore the Verdict was set aside.

Difference of Practice in C. B. and B. R. in case of Views.

That to mix the Persons returned on the Panels, is irregular, &c.

Strong versus Courtney.

Special Assumpsit, setting out, That whereas James T. had a Rent Charge issuing out of the Defendant's Land, the Defendant, in Consideration the Plaintiff would indemnify, and save him harmless against all Distresses to be taken by James T. out of or upon the Premises, promised to pay him such a Sum. Upon Non assumpsit, and Verdict for the Plaintiff, it was urged, That no Right of Distraining appeared for the said James, ideo no Consideration for the Promise: And of this Opinion was all the Court, tho' it were after Verdict; which they said, would not cure the Want of Consideration: Secus, if it had appeared that the Rent had been assigned to James. See Carthew 446.

Ld. Raym.
1217. S. C.
Special assump-
sit, For that James T. ha-
ving a Rent-
Charge out of
Defendant's
Land, would
save harmless
against Di-
stresses, &c.

That this was
no Considera-
tion, &c.

Ld. Raym. 368. Cal. temp. W. 3. 16, 214, 250, 308, 324. Cal. temp. An. 214, 147. Cal. temp. Mac. 294, 295, 296. Fitz-G. 302, 303, 202, 203. Comyns 98. Stra. 94, 653, 933.

S. C. 1 Salk.

Garibaldo *versus* Cagnoni.

102.

Vide ante 90.

In an Action

of Assault and

Battery, an *Ac**etiam* for 40 l.

was by Consent

put into a Writ,

&c.

1 Sid. 276,

307.

2 Keb. 101.

Caf. temp. An.

275.

1 Mod. Caf.

in L. & Eq.

227.

Stra. 922.

1 Mod. 8.

2 Keb. 552.

1 Sid. 425.

1 Vent. 44.

Declaration

and Recovery

for more than

the *Ac etiam*,and a *Remit'*,

denied.

Reasonable

Rule, That the

Plaintiff should

recover no

more than

mentioned in

the Writ.

If less be reco-

vered, 'tis no

Inconveniency.

Reasonable

Bail upon *Ac**etiam* ground-

ed.

A Condition upon an Indictment of Battery being against G. he in Consideration that C. the Prosecutor would not press for a great Fine, undertook to put in special Bail to an Action of Trespass to be brought by the Plaintiff for the said Battery: And at this Time a Writ which the Plaintiff C. had taken out, and returnable in Michaelmas Term past, was run out; and in Hillary Term Bail was put in, and after a Trial 100 l. Damages were given to the Plaintiff: And now a *Sci' fa'* being against the Bail, they applied to the Court for Relief; for that the *Ac etiam*, which was by Leave put in the said Writ in Michaelmas Term, was only 40 l. and the Bail meant to undertake for no more; and since the Plaintiff had declar'd to more Damages, and recovered more, the Bail were thereby altogether discharged: And a Rule of Court said to have been made in the 22d Year of King Charles, and found by Mr. Clarke in the then Secondary's Book, that in Case of Bail, if the Recovery were for more than was mentioned in the *Ac etiam*, the Bail should not be charged at all in ista Actione, was very much insisted on.

And the Ch. J. remembered a Case of Thompson and Collins, in which he had been of Counsel, in my Lord Pemberton's Time; where in an Indebit' assumpsit the Declaration and Recovery was for more than the *Ac etiam*; and there tho' it was offered to level it with the *Ac etiam* by entering a *Remit'* on the Record for the rest, it was denied them on Debate.

And note; In this Case upon Search, this Rule could not be found in the Clerk of the Rules Book: But the Ch. Just. said, There was Reason for such a Rule to pursue the Act 13 Car. 2. c. 2. that Bail should know what they came bound for, and not to be saddled with more; and that must be by recovering no more than was mentioned in the Writ, to which the Bail of Necessity must relate: Whereas if the Plaintiff recovers more, the Bail, if at all liable, must be liable for what is recovered; for their Condition is to answer the Condemnation, or render the Principal; and it would be extream hard to ensnare the Bail to a greater Sum than is mentioned in the Writ: And since the Process against them must be founded upon the Judgment, it seems from thence they must answer for all or none; but if less than is mentioned in the Writ be recovered, then there is no Inconveniency to the Bail; and if there be no Bail insisted on but common Bail, it is but just the Wrong-doer should answer whatever is recovered. And he further said, That in Cases of outrageous Batteries, when People came to him for Leave to charge with *Ac etiams*, he would give Leave to charge with a good Sum; but when they came for Bail, they must be content with Bail of reasonable Value, and not insist upon their Worth in Proportion to the Sum charged.

And

And Powell and the rest agreed, The Bail by no Means ought to answer for more than was mentioned in the *Ac etiam*.

And Powell added, That if such a Rule as was mentioned had been, the reasonable Construction of it would be, not to suffer the Bail to be charged with more than was mentioned in the Writ, but likewise not to discharge them for good and all; for tho' it be true the Processes against them must be for the Sum recovered, yet he said the Court might hold the Plaintiff from levying more than was mentioned in his Writ; and the Bail, upon bringing so much into Court, might obtain a Rule to stay any further Proceedings against them, as is done every Day in case of Render of the Principal before the Return of the second *Sci' fa'*, tho' in Strictness of Law they ought not to do it after a *Capias* returned against the Principal.

If when Recovery is for more, it be reasonable to discharge the Bail, &c.
1 Sid. 183, 258.

To which Holt, Ch. J. said, The Cases differed very much, for this Rule was made in Imitation and Pursuance of the Law, and they ought not to make any Construction contrary to it, and the Words of it were, That the Bail should be looked upon as none in *ista Actione*; and to render before Return of the second *Sci' fa'*, that was so by the ancient Course and Practice of the Court.

The Words of the Rule were, That the Bail should be looked upon as none in *ista Actione*.

But then it was further moved, that this Bail being of Hillary Term, could not be looked upon as Bail to the Writ returnable in Michaelmas Term, and then the Case would be no more than if one had by Consent, upon good Consideration, put in special Bail in a general Action of Assault and Battery, in which Case there would be no Pretence of a Surprise on the Bail, and therefore they ought to answer the whole Condemnation, which the Court inclined to; but being informed there was never any other Writ taken out, Clerk the Secondary informed the Court, That the filing of Bail without a Writ taken out before or after, was void: Which Holt, Ch. J. and Gould, affirmed to be true. But the other Clerks all said, that Rule was understood thus, viz. That if Bail were filed by Consent, and no Writ already taken out, nor taken out within 8 Days after, the Bail was void, that is to say, the Defendant was not thereby obliged to accept of a Declaration; but if he did accept one, it would be well, and this seemed a reasonable Explication; but at last the whole was referred to Mr. Clerk to examine. *Quære quid inde venit.*

That this Bail of Hill. Term could not be Bail to the Writ.

But note, Holt, Ch. J. wished the Attorneys to beware of charging extravagant *Ac etiams*, for otherwise an Action of the Case would lie for holding to excessive Bail.

Caution against extravagant *Ac etiams*, and excessive Bail.
1 Sid. 183.
Caf. temp. W.
3. 257, 273.

Note likewise, The same Point, in regard to a Recovery above the *Ac etiam*, came in Question afterwards this Term in the Case of Bovey v. Wheeler.

And then Holt, Ch. J. said, The above-mentioned Rule was made to rectify an extraordinary Practice in this Court; which was, If a

Man

Han became bound for another in an Action of 10 l. he was thereby Bail in all Actions of the same Term, by the same Plaintiff, against that Defendant, let the Sum be ever so great, which was mighty inconvenient.

And this Rule was made in Pursuance of the said Statute of 13 Car. 2. that the Bail might know what they undertook for.

S. C. Ld. Ray.
1061, 1472.
S. C. 1 Salk.

Domina Regina *versus* Tutchin.

51.
Ante 164.
State Trials, p.
659 to 706.
1 Lev. 143.
Upon an In-
formation a-
gainst Tutchin,
Author of the
Observator,
the *Distringas*
was tested
the Day after
the Return of
the *Ve' fa'*.
Moved in Ar-
rest.

1. For that
both the Writs
ought to have
been returnable
at a common
Day.
Vid. Cro. El.
820.
1 Danv. Abr.
335, &c. ib.
1 Lev. 2.
See Skinner
46, 253, &c.
Carthew 70,
76, 157, 172,
&c.
Cas. temp.
W. 3. 39, 248.

Difference be-
tween Things
originally be-
gun in B. R.
and brought up
by *Certiorari*.

AN Information was exhibited against him by the Attorney Gene-
ral in Easter Term last, for contriving, composing and publish-
ing a certain seditious Libel, intituled, The Observator. And pleading
Not guilty in Trinity Term, a *Ve' fa'* was issued out to the Sheriffs
of London, (the *Faã* being laid there) returnable die Lunæ post Tres
Sept' Mich', and the *Distringas* was then awarded on the Roll in the
common Form, with the *Nisi prius*, die Sabb' post' Crast' Animar'; but
the *Distringas* thro' Mistake was tested the 24th of October, viz. the
Day after the Return of the *Ve' fa'*, and after Verdict for the Queen,
Mountague moved in Arrest of Judgment,

1. That the Ven' and *Distring'* were made returnable at a Day
certain, whereas the *Faã* arising in another County, it ought to
have been at a common Day.

Holt, Ch. J. In case of Information, or other Proceeding origi-
nally commenced in this Court, the Process may be at a Day certain,
tho' into another County; and so has been lately settled here, in a
Case wherein we took it into Consideration, and ruled it so upon
Certificate of all the Clerks: But if an Indictment be removed up
hither by *Certiorari*, and after is carried down to Trial, there the
Process must not be returned at a Day certain, but at a Common
Day. Besides, there is great Reason it should be so here, for the
Information is exhibited on a Day certain, and the Defendant's Ap-
pearance to it is so too, and he pleads to it at a Day certain, and
then why should not the Process be so too? The Plea is, die Lunæ
Crast' Trin', and that is certain; for Crast' Trin', without more, is a
common Day. Indeed in Common Pleas, except it be where they
proceed to Bill or in Assize, they must go by common Days. And
even in this Court, in Assize, we may go by a Day certain; and
where one is sued here as present in Court, all must be by a Day
certain: And so of Proceedings by Bill in any County of England.
And since the Attorney General, by Reason of the universal Jurisdic-
tion of this Court, may file a Bill here for a Crime committed in
any County of England, he may make the Process returnable at a
Day certain, and he has his Election of the one or the other. Re-
liqua Cur' acc'. And the Difference is between Things originally
begun here, and brought hither by *Certiorari*.

2. That tho' the Distringas was well awarded on the Roll, on the Day of the Return of the Ven', which was the Day for both Parties in Court, yet the issuing a Distringas the Day after, and tested the Day after, was without Warrant, as not being according to the Award of the Court; for by the Statute of Nisi prius, the Process of Nisi prius is to be awarded in Præsentia Partium, and it ought to bear Teste of the same Day, or else it is a Discontinuance.

2. That tho' the Distringas was well awarded, yet the Issuing and Teste was without Warrant.

To this it was answered by Serjeant Powys, That this was amendable even at Common Law, being a bare Misprision of the Clerk, he having a good Warrant before him to guide himself by, viz. the Award of the Distringas on the Roll, by which a Day was given duly to the Parties, a Day of Nisi prius. And for Amendments at Common Law, before 14 Ed. 3. c. 6. which is the first Statute of Amendment, the Authority of 8 Co. 156. b. was urged by him. Want of Entry of a Continuance amended, and so of Misentry of Essoin by a Clerk. 22 Ed. 3. c. 10. a. A Discontinuance amended, and that must have been by Common Law, for the said Statute of 14 Ed. 3. is only for Amendments of a Letter or Syllable, and the Judges were so scrupulous, that they doubted whether they could amend a Word by it. 29 Ed. 3. 32. Habeas Corpus amended. Bro. Amendment, 32. 4 H. 6. 16. b. And the Book says, that such Amendments may be especially in Case of the King. F. Amendment 9, 12.

R. That it is amendable at common Law, being a Misprision of a Clerk. Vid. ante 264.

It is true, People of late have conceited, that nothing is amendable in criminal Proceedings, because, say they, they are excepted out of the Statute, as if nothing were amendable at Common Law; but in many Cases at Common Law, the King could amend where the Subject could not; as if Quare impedit, at the King's Suit, be præsentere instead of præsentare, it was amendable, tho' in an Original. But besides, this is a Matter within the express Words of the Statute of 8 H. 6. c. 12. 1. This is all in the same Term, while the Record is wholly in the Breast of the Court, and is relative to Matter of the same Term. And I know nothing but is amendable in the same Term, for 8 Co. 156. b. said, That at Common Law the Judges may amend their Judgment, as well as any other Part of the Record, in the same Term. And we are upon a Misprision of an Officer of the Court, who is to make up his Record, or issue Process according to the Act of the Court, which is right, and which he had before him, and that in the very Term in which it is committed; and we are not endeavouring to amend the Teste of an Original which comes out of another Court, but the Teste of a Judicial Writ, according to the Award of the Court, and no Statute of Amendment is against us in this.

Post 287. 'Tis within the express Words of 8 H. 6. c. 12.

And the Words of 8 H. 6. are very comprehensive, and would take in all criminal Matters whatsoever, as well as civil, if there had been no Exception in it; otherwise the Exception had been vain; therefore what is not foreprised by the Exception, is within the general Words of the Statute; and the Exception expresses only Indictments

Exception of criminal Matters in 8 H. 6. as to Indictments, Appeals, &c. Ld. Raym. 511, 565.

ments and Appeals of Treason or Felony, and Outlawries of the same : And the Statute of 14 Ed. 3. makes no Distinction between criminal and civil Causes. It may be the Statute of 32 H. 8. c. 1. does not extend to any Pleas of the Crown, because it mentions Party and Party, which in Decency cannot be applied to the King.

2 Cro. 502.

And he relied very much on 2 Cro. Harris's Case, Indictment for a Nuisance at the Sessions, and Not guilty pleaded, and the Clerk of Assize, who ought to have joined Issue for the King, omitted it, and the Matter being tried and found against the Defendant, this was moved in Arrest of Judgment; and yet, after several Years the Court ordered it to be amended. 2 Cro. 529. Information for Recusancy against Baron and Feme for Recusancy of the Feme, and the Entry was, Et præd. the Baron and Feme veniunt & præd. the Feme dicit quod ipsa non est inde culpabilis, & de hoc ponit se super Patriam. And this was likewise amended after Cleridia by the Docket of the Officer, it being a manifest Misprision of the Clerk; and yet this was a clear Discontinuance, for there was no Plea, and this Amendment was in another Term. Cro. Car. 144. Sir John Ashley's Case :

Quo Warranto.

In a Quo Warranto, the Defendant disclaimed specially, that is, the Disclaimer in the Paper-Book was so, and the Entry on the Roll was of a Disclaimer general: and a Year after this was amended, as the Court said, at Common Law, being only Misprision of the Clerk in copying the Paper-Book before him, which was right.

Post 272, 306.

1 Sid. 244. Upon an Indictment, the Ve'fa' was directed Vicecomitibus Cantuar', and the Return was only by one, there being in Truth but one Sheriff of Canterbury; and this was set right, by making an Entry on the Back that there was but one Sheriff, and this was said to be an Amendment at Common Law, without the Help of any Statute; and likewise that it might well be by the Statute of 8 H. 6. which does not extend to Informations at all, or if to any, not to Informations at Common Law, as this is: So he concluded that this was amendable at Common Law, being in the King's Case; or if not for that, yet that it might be by Reason of Misprision of the Clerk in the same Term; or if neither, that it was within the Purview of 8 H. 6. c. 12. and not foreprised by the Exception.

If this Misprision be foreprised by the Statute.

It imports to know what is amendable in Crown-Cases by Common Law.

The Attorney General, ad idem. This is a Case of great Concern, for if none of the Statutes of Amendments or Jeofails extend to Cases of the Crown, certainly it importeth much to know what is amendable in Crown-Cases by Common Law. The Preamble of 32 H. 8. c. 3. takes Notice of the Inconvenience of having Judgment stayed upon such nice Exceptions; and he agreed, that Statute could not be thought to extend to Crown-Cases, because of the Words Demandant and Tenant in the Statute; but from that he inferred, that the Crown-Cases did not stand in Need of it; for it would sound very harsh for the Subjects Causes to be taken Care of, and that the King's Case, in Matters of equal Mischiefe, should pass unregarded. The Law gives great Privileges and Prerogatives to Suits of the King, which the Subject has not: Demurrer to Evi-

dence

dence shall not be in the Case of the Queen, without Consent of her Counsel; otherwise in Case of a Subject. Queen after Demurrer joined may waive it, and come to issue. Vide 5 Co. Before Judgment in the Queen's Case, no Discontinuance can vitiate. Hard. 504. Discontinuance not to be alledg'd before Judgment, for till then, even in Case of a Subject, it may be amended at the Pleasure of the Court; Secus after Judgment in another Term. 2 Cro. 211. Want of Form in the King's Writ shall be amended, otherwise in the Case of a Subject. 4 H. 6. 18. F. Am. pl. 22. Original at Common Law amendable in the King's Case, but not in Case of Subject. 8 Co. 156.

Original amendable in Queen's Case.

And this is further manifest by every Day's Experience; for the Queen shall amend her Information before Issue joined, and this she may do even in Informations for Perjury, which is a most infamous Crime; and this by common Right of the Crown at Common Law, and more than a Subject can do in his Action. And such Amendments as we press for were always allowed, where it could not turn to the Prejudice of the Party; but he agreed, Amendment which would alter the Defence of the Party, or any Way turn to his Prejudice, ought not to be; and this is no such, for the Party had a right Day on the Roll, and he did appear and took his Trial at that Day. 20 H. 6. 18. Capias amendable in the King's Case, because no Prejudice to the Party, but Exigent is not, because he would be thereby prejudiced, viz. outlawed; and this stands clear of all Exceptions of Prejudice.

Amendment not to prejudice Party.

Then as to the Exception itself: Tho' it may seem by the Award on the Roll that the Writ ought to bear Teste the same Day, yet there appears no Reason to make it absolutely necessary it should be so, and there are no Authorities that the Law does require it. And by the Reason of the Thing it seems it may be otherwise; for the Ve. fa. is returnable all the 23d, and may be return'd any Time that Day, and the Court may sit all that Day, and peradventure the Clerk has not Time enough after the Award to make out a Writ till the next Day, and if so, they ought to Teste it according to the Truth the next Day. It is true, there is Reason it should be made out and tested in a reasonable Time after, that the Jury might have Time to appear, and the Party timely Notice to prepare for his Trial; but not that it should be absolutely necessary it should be tested on the Return of the Ve. fa. F. N. B. 20. b. Br. Discontinuance 59. Upon Writ of Error brought, if the Plaintiff does not assign Error, and sue out a Sci. fa. against the Defendant, ad audiend. Errores, of the same Term of which the Record is, all is discontinued, not said that he must do it at the Return of the Writ. 22 Ed. 4. 20. And all that is necessary at Return of the Writ is, that the same Day be given to the Jury and Parties, but not that the Process against the Jury be tested of that Day. Vide Br. Discont. of Process 53. Hab. Corpora Juratorum shall have the same Day that the Parties have, that is, it shall be continued to that Day; but not that the Teste must be of that Day. Now the Jury and Party are continued over to a Day certain by the Award on the Roll.

If absolutely necessary to Teste the Discontinuas the Day of Return of Ve. fa.

And

'Tis necessary
in an Appeal,
&c.
Vide Cro. El.
433, 572.

No Impar-
lance in Ap-
peal.

If this ought
to be set right
by Courfe of
Common Law.

1 Cro. 526.
That general
Words of Act
shall not bind
or Bar the
King.
Amendment in
a Quo War-
ranto.

And I don't know any Case that makes it necessary that the Teste should be of the same Day with the Return of the first Writ, but that of Yelv. 204. and in Cro. Jac. 203. It is in an Appeal which is upon another Reason; for in an Appeal, if there be any mean Time between the Return of one Process, and the Teste of another, as in that Case there were seven Days, all the Process is discontinued; but that is upon a special Reason, that of being in Appeal, where the Proceedings have always been very strict, and by the Common Law all Appeals were to be carried by fresh Pursuit; and so it was till the Statute of Gloucester, which gives them a Year and a Day, within which it must be brought, and in an Appeal he cannot imparl; and if he does, it is a Discontinuance; and this is the only Authority I can find: But in Cro. El. 572. where it is taken Notice of that the Process bore Teste the Day after the Return of the Ve' fa', and the Exception is taken to other Matter on the Record; yet this was not mentioned as a Fault, or amended. Besides, the Course of the Crown-Office has gone sometimes this Way, and sometimes another Way, and due Weight shall be laid upon the Course of a Court.

However, if it be amiss, it ought to be set right, and that by the Course of the Common Law, without the Help of any Statute; for it is the Dispersion of the Clerk of the Court, which in Strianness is the Act of the Court in the same Term, and by Consequence within the Power of the Court; and besides, the Crown without Doubt has the Benefit of the Statute of Amendments in many Cases, and great Authorities are so; 14 Ed. 3. has no exclusive Words in it, and I see no Reason why it should not extend to Crown-Causes, for there is nothing in the Statute that may lead to such a Construction: Statute of 32 H. 8. I agree does not extend to it for the Reason before mentioned; but that of 16 & 17 Car. 2. is very general and extensive, without any Thing in it to exclude Crown-Causes; and the general Words of the Statute of 36 Ed. 3. c. 15. for Entry of Pleas in Latin, and Pleading in English, extends to Pleas of the Crown, *ideo a pari*: And my Lord Hale, for whose Opinion all Professors of the Law have a great Veneration, was of Opinion in my Lord Fitz-Walter's Case of a Quo Warranto, where the Writ issued to Sheriffs, there being but one, That that Mistake was amendable by the Statute of 16 & 17 Car. 2. 2. It is true, it went off after upon another Point, viz. That it appeared the Jury had thrown Dice for their Verdict; but upon several Motions, Hale abided by his Opinion, That it was amendable, 1 Sid. King v. Read, and 8 Co. Blackmore's Case throughout is, That all Cases where the Words of the Statute are not between Party and Party, that general Words will reach to Crown-Causes if they be not excepted: And this is not excepted by the Statute of 8 H. 6. the Words whereof are as comprehensive and express as can be for us; That Statute indeed does not extend to all Pleas of the Crown, as to Appeals, Indictments of Treason or Felony, and Process thereupon, because they are excepted by express Words; but to all other it does.

In Dyer 346, 347, an Information is amended in a stronger Case than this: It was in an Information Qui tam for Usury, and the Party brought in by Subpoena, and appear'd by Attorney, and pleaded Not guilty; and this taken for an Exception: And yet after Debate, Jud' pro Quer' propter Stat' de Jeof. as the Book says: And much of the common Course of this Court seems to be upon this Ground and Reason, That Pleas of the Crown are amendable either by Common Law, or by the Statute, as the Practice of amending Records removed by Certiorari by the Roll below.

But in this Case, taking it for granted that the Distringas ought to bear Teste on the Return of the Ve' fa', What do we desire to amend? Only a Letter or Syllable, or rather a Title; for the Date is in Latin Figures XXIII. and to strike out the last Stroke is what we desire; a Thing within the express Words of 14 Ed. 3. in the Case of a Subject; and the Statute makes no Difference between that and Cases of the Crown: And greater Amendments than this have been at the Common Law; and that of late Days, 8 Co. 156. says, Without Doubt there were Amendments at Common Law: And we put it upon the other Side to shew, that there was any Diversity between Crown-Causes and those of Subjects, except it were that Crown-Causes were amended where Subject's Cause could not be: And if they don't shew any such Authority, then all the Authorities for Amendments in Civil Causes are a fortiori in criminal Causes: And Co. (ubi supra) says, That at Common Law any Variance in any Part of the Record from the Original, was amendable; so the Judges may amend their own Judgment, as also any Part of the Record in the same Term, but Disposition of the Clerk in Process was not amendable in another Term: So it was his Opinion, that it could be done any Time the same Term; but he might go a little further, and say it might be any Time before Judgment; for all the old Books are so. Now the Reason of that Rule extends to all criminal Causes as well as civil: If a Fine be set in Court the first Day of Term, by Common Law it may be mitigated or discharged any Time during the Term; Trin. 7 W. 3. the King v. Walcott: Writ of Error to reverse an Attainder of Treason, a necessary Part of the Judgment being omitted, the Reversal was actually pronounced and entered on the Roll; but after the Court finding that there were Precedents and Forms of Entries to the contrary, they ordered the Judgment to be struck out again the same Term, and to be put in the Paper to be argued; and the Process of the Court, as well as their Judgment, is in the Breast of the Court all the same Term.

Informations amended.
10 Ed. 3. 20.
1 Sid. 148,
259.

That 'tis now desired only to amend a Title, &c. and ought rather to be in Crown Causes.

Vide 1 Vent. 132. in another Term.

1 Cro. 251.
1 Vent. 69.
Raym. 186.
4 Mod. 395.
Parliament Cases 125.

A second Instance of this Practice is, That all Dispositions of the Clerk of Assize, or Justices of Peace, in certifying the Indictment in the Caption, may be amended the same Term it comes in. 1 Saund. 200. If Indictment be vitious in the Caption, the Court by Common Law may amend it the same Term it comes in. 1 Sid. 259. The King v. Glover. The Coroner was ordered to attend, and to amend an Inquisition return'd hither. Cro. Car. 276. Indictment upon the Statute of H. 6. of Forcible Entries; it laid the Inquisition to have been taken

Amendment of an Indictment vitious in the Caption, &c.

Certificate of
Clerk of Af-
fize.
Vide 1 Jo.
Stafford's
Case.

apud S. coram A. & B. Justiciar' Pacis in Partibus præd'; and there being three Divisions in the County, and three several Commissions for them, Exception was taken that it did not appear for which of them A. and B. were Justices: And this was held a fatal Exception; but ruled, that if the Certificate of the Clerk of Affize were faulty by his Misprision, they would amend it by the Roll below: Just. Jones; Samson's Case, 1 Roll. Abr. 196. Error to reverse an Indictment of Murder; the Certificate of the Clerk of Affize was wrong, for want of a Continuance; and one of the Judges would have it amended at Common Law, for the great Mischief that would otherwise ensue; but Just. Jones was against it, except the King did specially desire it.

Essoins a-
mended, &c.
7 E. 4. 15.

Distring', &c.
amended all
at Common
Law.
See Skinner
46, &c.

And per Holt, Ch. Just. That must be by special Mandate: But there two Judges were against Just. Jones for its being amended. Pal. 480. Amendment of an Indictment, according to a Precedent in Edward the 4th's Time; and that before the Statute of Amendments, civil and criminal Matters were amended, he quoted 4 Ed. 3. 9. b. Entry of Essoin amended. 5 Ed. 3. 25. Entry of Voucher to Warranty amended. 3 Lev. 420. That the Record of a Judgment is in the Breast of the Court all the same Term, and all Process till Judgment. 9 E. 4. 3. Bro. Amend. 46. Default of Process amendable any Time before Judgment. 7 H. 6. 27. After Issue joined, a Distringas, and no Award of Tales on the Roll, and there being a Tales on the Back of the Writ, it was amended. Fitz. Amend. 32. Bro. Discontinuance 15, 13. Fitz. Am. 13, 65. g. 16, 17. 22 Ed. 3. 19. Bro. Amend. 105. The Record was, that such a one, Gentleman; and in the Nisi prius Roll, Gentleman was omitted, and it was amended, and all by the Common Law. Cro. Car. 563. On the Ve' fa', S. S. was return'd, and the Distringas was so, but the Panel return'd was D. S. and that Variance was moved in Arrest of Judgment; but upon Examination, it was found to be only a Misprision of the Sheriff's Clerk, and therefore amendable by Common Law, without the Aid of the Statute of H. 6. Fitz. Amendment 16, 17. Bro. Amend. 27. Trespas to the Damage of 100l. the Record of Nisi prius was 100s. and Verdict 100l. and this Mistake amended as a Misprision of the Clerk; and there the Judge of Nisi prius had no more Warrant to try that Issue than is in our Case. Bro. Amend. 26, 29. Fitz. Am. 16, 54, 55. all at Common Law. 2 Ri. 3. 11. Br. Amend. 87. Things of the same Nature with this were amended at Common Law, and the Statute makes no Alteration against us, but where it is expressly so. Bro. Amend. 22, 59.

Why should
not Amend-
ments be in
Informations
by Common
Law?

There are not in the Year-Books many Instances of criminal Proceedings, and that is a great Argument that these Niceties have not crept into the Law in criminal Matters; for if they had, something of them would be found: Then if there were Amendments at Common Law, why shall there not be some in Informations? There are Multitudes of Amendments of this Nature in civil Cases. 1 Cro. 144. is an Amendment which could be at Common Law even in another Term, as is there held; and sure it is in the Power of the Court to do Right to the Queen, as well

well as to the Subject; and he quoted my Lord Macclesfield's Case: Rule was to reverse an Attainder of High Treason about sixteen Years before upon Writ of Error, and no Entry thereof, or any Record made up, no Continuance or Assignment of Error; and yet, to reverse this Attainder, Leave was given to make up the Record now: And if this Help was given to a Subject, Why should not the like be in the Queen's Case? And there it was said to be a Default in the Officer of the Court, and that was in some respect the Default of the Court; therefore he was ordered to do that now, which then he ought to have done; so here it is to make your Officer do what he ought to have done before: And the Case of the Queen against the Warden of the Fleet, was much stronger than this; for there a Ve' fa' upon Issue join'd in Chancery, was return'd hither the 4th of February, and the Record it self did not come in till the 7th; and the Officer mark'd it to have come in on the very Day, on which it came in Truth: And the Court ordered the Matter of Fact to be examined, in order, that if it should appear that the Record had come in on the 4th, it should be set right; but if appearing not to have come in till the 7th, they could not amend it, being a Discontinuance: But upon Writ of Error before the Lords, that Judgment was reversed for this Reason; For that the Clerk might have enter'd it as of the 4th, though in Truth it came in after.

Amendment upon a Rule to reverse an Attainder.

2. If this be only a Misprision of the Clerk.

But Holt, Ch. Just. said, That Matter was not set right in the King's Bench to this Day; for they look'd upon it to be against their Duty as Judges, to enter a Record against Truth.

Lastly, The Attorney General said, That the making a Writ different from the Roll, was only the Misprision of the Clerk: Vide Cro. El. 467. 1 Roll. Abr. 200, that Teste out of Term, or on Sunday, is the Fault of the Clerk.

Broderick contra. And first, he took a Difference between Suit of the King in civil Prosecution of his Right, and a Prosecution against a Subject for a Crime; in the first Case he has greater Favour than a Subject, in the other the strictest Nicety is to be kept to: And upon this Difference he would distinguish the Cases of Quo Warranto's from the present Case, as likewise that of Warden of the Fleet; for they are to be look'd on as Prosecutions for the King's Civil Right. He agreed, there were some Amendments at Common Law; but said, If there were Amendments in all the Instances put by them, there would be little Use of the Statute of Jeofails, or of Amendments: He denied that any criminal Proceedings were amendable by the Statute of H. 6. or 16 & 17 Car. 2. and no Authority of any such Amendment is quoted except the Case of Dyer 346, 347. And 1 Ro. Rep. 447. takes Notice of the Case in Dyer, and says, It was held not amendable in 22 El. And 8 Co. in the middle of Blackmore's Case, says, That the Statute did not extend to criminal Proceedings. 1 Cro. 312. that the Statute of Jeofails does not extend to Pleas of the Crown; and

Difference where the King sues in civil Prosecution of his Right, &c.

If criminal Proceedings are amendable by Statute, &c.

A wrong *Ve-*
nue is fatal.

Ve' fa' de
novo.

Informations
not amended.

Records by
Certiorari
may be a-
mended.

If a Necessity
that *Distrin-*
gas should be
tested on the
Day of Re-
turn of *Ve'*
fa'.

If Officer
may alter
what he had
done.

Arg. That
the *Teste* of
this Writ is
not amenda-
ble at Com-
mon Law.
See Carth.

70, 76, 157,
172, &c.
Skinner 46,
253, &c.
Caf. temp.
An. 84, 230,
233.

If Error in
the *Teste* of a
Writ be so
amendable.

and a wrong Venue is fatal in a Quo Warranto, Style 307. In Suit upon the Statute of Inmates, a *Distringas* boze *Teste* out of Term, and it was not amended; and a *Ve' fa' de novo* was awarded, Vid. 3 Keb. 485. the Opinion of Hale so much relied on of the other Side; but in 1 Vent. 17, 35. Information for Forgery at Common Law, denied to be amended. Hard. 217. Information upon the Statute of Navigation, for Importing certain Spices of the Growth of Asia, Africa or America, from Holland beyond the Seas. Exception taken, That it was not said that Holland was not in Asia, Africa or America, and held fatal though after Verdict: He agreed, that Records, come hither by *Certiorari*, if variant from the Roll below, shall be amended by it: The Case of the Writ directed to two Sheriffs when there was but one, was amended by having an Indorsement made on the Back of the Writ, that there was but one Sheriff in Fact; and it was an Amendment by the Common Law, according to a Precedent in 5 H. 7. where a Writ was directed *Coronatoribus*. 1 Keb. 900, 901. But it is said, That there is no Necessity it should be tested on the Day of the Return of *Ve' fa'*, but that is expressly against the Case in Yelverton before put: This is not like the Case of Walcot, that was an Alteration of the Judgment of the Court, which is not compleat till the last Day of Term; nor is it like my Lord Macclesfield's Case, for doubtless the Court may supply lost Records, or put Things in the State they have been in before, or make their Officer do that which he ought to have done; but this is to alter what he has done: Vid. 3 Cro. 572. *Ve' fa'* returnable at a Day different from Award of Court, and Trial thereupon, not amendable: Per Popham, 1 Roll. Abr. 201. Yelv. 60. Information on a penal Statute, and the *Ve' fa'* on the Roll awarded, was coram Nobis ubicunque, and that *Ve' fa'* made out, was coram Nobis without more; and Judgment stay'd thereupon.

Holt, Ch. Just. The Case of the Warden of the Fleet was a civil Action, and no criminal Prosecution; but meerly a civil Course to entitle the King to an Office forfeited to him.

Mountague having had Time given him to answer, argued it solemnly:

1st. This Point as it is of Concern to the Crown, so it is of high Importance to the Subject; for it is to make a Precedent that will be leading in the like Cases. Again, Actions *Qui tam*, which in some Respects are between Subject and Subject, have been always excepted out of the Statute of Jeofails; ideo a fortiori Actions of higher Nature were so.

That the *Teste* of this Writ is not amendable at Common Law; though I agree many Amendments were at Common Law, no Authority has been quoted that Error in the *Teste* of a Writ was amendable at Common Law: Coke in his 8th Rep. 156. b. 157. a. says, That Judges may amend their own Judgment in the same Term, or any other Part of the Record; but it does

not

not from thence follow, neither does he say it, that they may amend Faults in Writs issued out of their Record to an Officer in Pais, or Returns made by him: And the Reason why they may amend their own Judgments and Continuances, which are the only Instances given there, is, because they are their own proper Acts, which, as it is there said by my Lord Coke, remain in their Breasts in the same Term; but the Act of another in Pursuance of their Award cannot be said to be their Act, and a Writ made out to an Officer cannot be said to be in the Breast of the Court: If Entry of the Clerk of the Award of the Court had been different, there might be some Colour to amend the Roll; but this is not so, you will take Notice that the Writ ought to be according to your Award, and that it is not so, is the Fault of the Officer, not of Court: And all their Authorities out of the Year-Books are between Party and Party, and not like this: Not within the Statute, the Words of 44 Ed. 3. are very large, and yet there is not one Authority of Amendment of Crown-Causes by that Statute: And Coke holds, in his 8th Rep. 57. b. that Statute did not extend to Pleas of the Crown; and this he says generally, without saying that it is because they are excepted, as he says, upon the Statute of H. 6. in that Case; and this Statute of 14 Ed. 3. has no Exception; and yet by the Opinion of that Book, the Words of it do not comprehend Pleas of the Crown: And what can be the Reason that the general Words of this Statute do not extend to Pleas of the Crown, as it has been acquiesced unto ever since, but the great Indulgence that is given to the Subject in criminal Matters?

Or the Act of another in Pursuance of the Award of the Court.

Not within Stat. 14 Ed. 3.

Object. The Crown's not being relieved by the Statute, is a Sign it did not want it; Hard. 504. 2 Cro. 211. that there can be no Discontinuance in Crown-Causes till Judgment, those Cases extend only to what we agree, that Acts of the Court are in their Breast before Judgment; and so is 3 Lev. 430. and Coke's Note, That the Statute did not extend to Pleas of the Crown, would be impertinent if that were so that they did not need it.

If Pleas of the Crown wanted any Relief as by that Statute.

As to the Statute of 8 H. 6. which has an Exception of Appeals, of Indisements of Treason and Felony, and Outlawry on the same; from whence it is strongly urged, that it extends to our Case, because it is not excepted;

I answer, 1st, That the Words of it are not more comprehensive than those of 14 Ed. 3. that of H. 6. is all Misprision of Clerk in Writ, the other is all Misprision in Process, so they are co-extensive: And the Exception, we say, is only ex abundanti cautela of some scrupulous Law-maker, or but mention'd for Instances to shew they meant not it should extend to Pleas of the Crown. Many Estates-Call are not mentioned in the Particulars instanced by the Statute De Donis; and so are many Offices not within the Enumeration of Particulars in the Statute of Ed. 6. against selling of Offices: So since the Proceedings of all the Time, ever since the making of these, have gone against the Notion of amending of Crown-Causes, it will be hard to begin now.

As to Stat. 8 H. 6. 'tis all Misprision of Clerk in Writ, &c.

That this was not a Misprision, but the Nescience of the Clerk, and not amendable. Vid. post 286. in pede.

250.

And this Variance of the Roll from the Teste cannot be thought the Slip of the Clerk. Indeed if the Day certain of which the Writ ought to bear Teste were entered on the Roll, then it might be a Misprision of the Clerk not to imitate what was set before him; but that being not so, it was the Nescience of the Clerk, that he did not know, but it would do well to have it tested at any subsequent Time; and Faults through Nescience of the Clerk are not amendable. And Amendments here would quite alter the Writ, and make it quite another Writ, as much as the 24th differs from the 23d, and that such Amendment would be like the Alteration made by Justice Ingram, whereof Mention is made in 2 Ro. 3. 10. a. for which he was fined 800 Marks. But per Cur. That Alteration was made extrajudicially and clandestinely, and that made the Crime of it. And he relied on Gage's Case in Co. Ent. and in More and Child *versus* Harvey. Mich. 11. W. 3. where, on a Sci. fa. upon a Record out of Chancery, Issue was join'd, and a Nisi prius was on the very Day of the Return of the Writ. But per Cur. That could not be set right, because the Trial was actually had before the Return of the Writ. And he quoted the Opinion of Noy, in Cro. Car. 144. that none of the Statutes extended to the King's Case.

Allocatur in Cases of Removal by *Certiorari*, where the Term is but as one Day.

Parker, of the same Side. As to Records removed hither by *Certiorari* the same Term they come in, to have them amended, the Truth is so; for when a Record is removed hither by *Certiorari*, by Intendment of Law the very Record is brought hither; but if it appear to the Court not to be rightly entered, they will do it, because all the Term it is in their Breast: But it is not like Writs issuing out and coming in the same Term, for there it is otherwise; for as to Records coming by *Certiorari*, the Term is but one Day, and the Court are not absolutely possess'd of it till that Day be out; but as to Writs, the Term has several Returns and Days in it.

And here the Fact was, That the Writ was really made out at a Day after the 23d, and tested according to the Truth on that Day; and to make it tested against this, would be to go against the Truth.

That the Writ ought to be made out in *Præsentia Partium*.

And we say, That the Writ ought in Law to appear to have been made out in *Præsentia Partium*; and the Command of the Court is not by the Entry on the Roll, but by the Writ. If indeed it had been made out at a Day after, and tested of the Return of Ven. it would have been intended to have been well, and made out of the Time it bears Teste.

And he said, The Difference in Crown-Causes was between Suit for the King's Civil Right, which is favoured, and Criminal Prosecutions, which are *stricti Juris*.

Difference in Point of Amendment of Writs.

And he took another Diversity, in Point of Amendment of Writs on which nothing is done, and Writs executed: As if on a *Capias* nothing be done, but *Non est inventus* returned, that may be amended, when if the Party were taken upon it; it would be otherwise.

Ve. fa. when amendable.

And for this Diversity, he relied on the Opinion of Popham, in 3 Cro. 572. A *Ve. fa.* was rightly awarded, and made out (through Mistake) wrong: Per Popham, If a Trial had been upon it, it should not

not be amended. Vide 34 H. 6. 2 Br. Am. pl. 10. 3. Juroꝝ returned upon a Habeas Corpora different from Ve. fa. and not amended.

And there is another Diversity where the thing is really done well; as if the Ve. fa. be of one Person, and he is really sworn, but by another Name, this was amended. Vide 28 H. 6. 3. 2 Sid. 12. Palm. 490. 1 Ro. Ab. 196.

Serjeant Powys, by Way of Replication. As to Diversity between the King's civil Right and criminal Prosecution, they quote no Place where it is taken; and if the King has that great Favour in the Prosecution of his civil Right, for that it concerns the Revenues of the Crown, in which the Publick have an Interest, a fortiori it ought to be in Prosecutions for Crimes which is for the Administration of Justice, and in which the Subject, viz. the Publick, have the highest Concern that they should not go unpunish'd, especially where the Offender loses no legal Advantage, or receives any real Prejudice by it.

If this Slip of the Clerk be prejudicial to the Offender.

2. It is admitted, that all Acts of the Court, even the highest and most transcendent, are amendable in the same Term; a fortiori then should the Slip of a Clerk in pursuing the Warrant of the Court be so too, that likewise being a Matter no Way prejudicial to the Offender.

3. If a Writ original, when a Fault is discovered therein, shall be sent into Chancery, to have this Mistake of a Clerk there amended by that Court; Why shall not this Court in like Manner amend the Mistake of their Clerk in a Writ issuing out here?

Then great Endeavours have been used to exclude this Case out of the Benefit of the two Acts of Parliament, for that the general Notion has been, that those Statutes did not extend to criminal Causes or Proceedings: But sure the Opinion of my Lord Vaughan in his Case of collateral Warranty is very reasonable, That ancient Interpretations ought to be followed; but that, on the other Hand, a Thousand Resolutions against the express Words of an Act of Parliament ought not to prevail. And the Words of the Statute of H. 6. are very expressive and general. All, &c. And the Exception very particular.

If the Acts of Parliament exclude this Case.

Quære and Vid. ib. 170, and 327.

Vide 1 Jo. 423, 424.

Attorney General. Sure the Diversity between civil and criminal Prosecution of the Crown, as to the Point of legal Favour, is very groundless; for we all know, that by the Common Law a Criminal was not to have a Copy of his Indictment, or Counsel to plead for him, which is now remedied in Case of Treason; and before, and even now in all Cases of Felony, the Defendant has no other Opportunity of defending himself but merely upon the Fact, Guilty or Not guilty.

Arg. Per Att. Gen.

It is odd to say, that if the Roll on the Award had been wrong, it might be amended as the Act of the Court; and that the Slip of the Clerk in Pursuance of the Award of the Court which is right, shall not be amended; that is, that when there is nothing to amend by,

by, it shall be amended, and not when there is a Good Foundation to amend by.

It is not true to say, that there is no more Reason to bring Pleas of the Crown within the Statute of 8 H. 6. than within that of 14 Ed. 3. for that 14 Ed. 3. has the Word Party in it, which may have been the Reason why it has not been construed to extend to Crown-Causes; but there is no such Word in the Statute of H. 6. and Co. seems strongly of this Opinion in Blackmore's Case; for he says generally, That 14 Ed. 3. does not extend to Crown-Causes; but when he talks of that of H. 6. he says, That Statute extends not to Crown-Causes: Why? Because they are excepted.

If this Amendment be against the current Opinion in all Ages.

But it is objected, That we contend against the current Opinion in all Ages, and we agree it was generally taken so, tho' no direct Authority be in the Case; and there are not many Authorities express, even upon the Statute of Jeofails.

Q. Stat. 29
Car. 2. c. 3.
sect. 2. i. e.
of Frauds.
Post 281.

And such general received Opinion upon a Matter never solemnly adjudged, is of no great Weight; for it was a Common Opinion ever since the making of the Statute 32. concerning Actions by Assignees of a Reversion, that it did not extend to an Assignee of a Copyholder. And though there be a Case in Yelv. agreeable to that Opinion, yet about 12 Years ago, when it came thoroughly to be considered, it was held, That that Statute did extend to Copyholds. Some Opinions sudden, and passing sub Silentio, ought not to be of any great Consideration.

I do agree this is a Case of great Consequence; But what is the Consequence? Whether an Offender should go unpunish'd? And sure Criminals are not the Favourites of the Law. There is indeed Favour where Life is in Question, but none in case of inferior Offences? And it is more for the Honour of Justice and Law that Criminals should be punished, than escape upon such Niceties; But however, all this must stand upon the Law, and every Body is to have Justice.

Against a known Rule of Law.

As to 2 Cro. 211. where it is obiter said, That the Statute of Jeofails shall not extend to the Crown except it be expressly named, that is, directly against a known and true Rule of Law, upon Construction that general Words of an Act of Parliament for Furtherance of Justice, or Suppressing of Wrong, shall bind the King. And in the Case in Style 304. Suit upon the Statute of Inmates, and a Distringas tested on Sunday, and the Question, Whether it was amendable by 18 El. or 21 Jac. 1? And held not; but no Mention was made of 8 H. 6. And Yelv. 60. was an Information upon a penal Statute, and the Rule was of a sudden, Let Judgment stay; but that is not to be understood as a final Determination; and besides that is excepted by the subsequent Statutes.

If this be Misprision or Nescience.

And to say that this is no Misprision, but Forgetfulness, which is Nescience, Quia omnis Scientia est Reminiscentia, ideo omnis Ignorantia est Oblivio: We say, That all Defect through Want of due Care or Diligence is a Misprision, and so is 8 Co. 160. b. If a Clerk imbezils the Record voluntarily, or suffers to be defaced by Accidents, through Want of Care, it is a Misprision. And the Amendment in Sid. by Suggestion on the Roll of a Fact otherwise out of their Notice,

tice, is much more than we desire here: And a Quo Warranto is not Quo Warranto a civil Prosecution for Ouster of the Franchise; for suppose the Defendant disclaim in the Franchise, yet he must further answer the Usurpation; and if it be found against him, he shall be fined.

Holt, Ch. Just. The Case of Sherrot and Talbot does not come up C. J. as to a Quo warranto and Indictment. to this Case; That was an Amendment for the Subject and in a civil Case. And sure if in a Quo Warranto a Subject makes a limited Disclaimer, and the Clerk enters it a general One, this ought to be amended: And on the other Side, if an Original Indictment be right, and the Clerk enters it wrong on the Plea-Roll, it shall be amended; And Harris's Case is a very shrewd Case; in capital Matters there never is a compleat Issue join'd, but de hoc Ponit se super Patriam, but in other criminal Cases it is otherwise; and the Case of Sir John Curson, is a strong Case too: Indeed, this is a Case of great Q. If Tufston. That this is a Case of great Consequence. Consequence; and it has been the general receiv'd Opinion, that the Statutes of Jeofails, or Amendments, did not extend to Pleas of the Crown, and great Regard is to be had to that; and it is true, at the Judgment of the Case in Style 304. no Mention was made of the Statute of H. 6. and that is rather an Argument it was clearly conceived it would not help them, than that it was not thought of; for there were very learned Men then at the Bar: And the Reason of the late Judgment in Case of Action brought by Assignee of a Copyholder, was founded upon the Rule taken in 3 Co.--- That general Words of Act of Parliament shall extend to Copyhold Estate, where it is for the Benefit of the Tenant, and not to the Prejudice of the Lord. Ante 280. Case of Assignee of a Copyholder.

The Court having taken Time to consider till the last Day of this Term, now the Attorney General pressing for their Resolution, they argued seriatim thus: After they all declared they could wish for longer Time, not that they were unsettled in their Opinions, but to digest and methodize their Reasons to greater Satisfaction.

Gould, Just. I hold it amendable at Common Law; for otherwise, Arg. per Gould Just. That it is amendable by the Common Law. what mean all the Amendments in Indictments and Informations quoted by Mr. Attorney? For the Purpose, that of 2 Bulst. 35. and the Case there quoted by one of the Judges: Two were indicted for Felony, and found guilty: The Judge that tried them, found the Indictment was in the singular Number, and therefore stay'd Judgment; and after upon Consideration, by the Opinion of the ten Judges, it was amended, and the Men hanged; and, I say, that must have been by the Common Law; Vid. Raymond 440. And I take it, that Faults that do not alter the Issue or Trial, may be amended; and he relied on Sir John Curson's Case in 2 Cro. and Godfrey's Case in Sid. and Sherrot and Talbot's Case: And indeed, if it were not for Bradley and Banke's Case, I should think it well enough, and a good Continuance; for the 23d all Day the Defendant may be in Court, and the very first Minute of the 24th here is Process issues out; and the Case of Bradley *versus* Bankes, as it is in Cro. Jac. does not at all contradict this Opinion.

Powys accord.
against the
common No-
tion.

Purview of
Stat. H. 6. is
express, &c.

Opinions con-
ceived upon
Lord Coke's
Saying.

If here there
be any Inter-
val of Time,
&c.

That there
have been
greater A-
mendments
in capital
Matters in an
Information.

Powys accord. 1. This is an Information perfectly at Common Law, and not upon any Penal Statute: It has obtained, That the Statute of Jeofails extends not to any Crown-Cases, because they have an Exception of all Indisements and Informations upon Penal Statutes; and it is a common Notion, That no Crown Matters shall be amended by any Statute of Amendments; but it seems very odd to make such Interpretation upon the Statute of H. 6. for the Purview of that Statute is as express and general as can be; and the Exception but particular; therefore to extend it to Things of inferiour Nature, is very wonderful to me: In the Lord Bridgwater's Case, my Lord Hale thought the Statute of 8 H. 6. was not to be so restrained; but the Exception was an excellent Key to open the Meaning of it, that is, to amend whatever comes within the Generality of the Purview, and is not excepted by it: And he was of Opinion, That Crown-Causes did want, and in many Cases ought, to have the Help of the Statute of Amendments and Jeofails; but the rest did incline against him: And my Lord Coke saying, That 8 H. 6. extends not to Informations in Crown-Causes, because they are excepted, and we finding upon Perusal of the Statute that they are not excepted, make the Reason run quite another Way; and I believe such Opinions as are against me, have been conceived upon the Credit of that Saying of Coke, without any further Examination; and though the King be not named within the Purview, yet his being named within the Exception, shews the Law-makers understood that without the Exception it would extend even to all Crown-Causes; however, in regard to the Opinions against me upon the Statute, I do not go upon the Statute, but hold it amendable at Common Law. And much I think may be said upon the Reason of the Thing, that it is very well as it is; the Return is on the 23d, and so is the Award, and the Writ issues on the 24th; so that there is no Interval of Time or Chasm between the one and the other, but the Minute the one leaves it, the other takes it up: The Words of the Award are, *Præceptum est quod Distringat*; and that regards Futurity, and cannot be on the 23d, because that would be to distrain them before any Default in them; for they have all the 23d to appear, and the next Day without Interruption continues the Process. As to the Case of *Bradley versus Banks*, as it is in 2 Cro. it does not contradict this Opinion, but seems rather to favour it; for there Notice is only taken of the Gap between the Teste of a Capias and the Return of the Original in Appeal, which was seven or eight Days: And though Yelv. says further, That the Exigent bore Teste the Day after the Return of the Capias, which was ill; yet Cro. taking Notice only of the great Distance of Time between the Return of the Original and the Teste of the Capias, seems as if he had conceived that the Court had grounded their Opinion upon that: But that this is amendable at Common Law, and sure there are much bolder Amendments even in capital Matters; and we are to consider that this is but the Disposition of the Clerk in Process, and that in an Offence of an inferiour Nature; and if there have been greater Amendments in Capitals, I think this may be well amended: Vid. 1 Sid. 243, 66. 1 Keb. 191, 215. for Common Law

Amendments

Amendments in Information for Perjury, the Ve'fa' was J. S. without Addition, and by Consequence must be J. S. Senior, and Distringas J. S. Junior, quite another Person, and amended; 2 Bul. 35. Pal. 480. that this is Disposition of Clerk, 1 Roll. Abr. 201. Cro. El. 572. So this being an Information at Common Law, and there being Amendments at Common Law, and this being Disposition of the Clerk, the Award of Court being right, I hold it ought to be amended.

Powell contra. This is a Case of great Consequence: And the first Question is, Whether this be a Fault at all? Powell contra;
That 'tis not
amendable.

2. If it be, whether it be amendable at Common Law, or by the two Statutes of Amendments of 14 Ed. 3. or 8 H. 6. for the other Statutes are of Jeofails, and not of Amendments?

This is a Discontinuance at Common Law; for all Processes must be continued from the very Time of the Award of the Court, and the Authority of the Case of Bradley and Banks, and Reason of it is so; and the Reason is, because it is a Discontinuance, and not because it is an Appeal, in which there must be fresh Pursuit, as the Judges said; but it must be because it is a Discontinuance, in all Cases at Common Law; a fortiori it will be so in Appeal in which fresh Pursuit is required, and the Saying of the Judges is so to be understood; it is true, the Roll is rightly continued, but the Process to the Jury is discontinued; 21 Ed. 4. 20. Defendant at the Day was essoin'd to Quinden. Pasch. there must be an idem Dies to the other; but that could not be given to the Jury, but they must be continued by Hab' Corp', and that on the very Return of the Ve'fa'; and this Case is not right in Bro. It is true, since the Statute of Jeofails, these Things have not been kept up to; but at Common Law there must be a Chain of Process against the Jury, as well as in case of other Continuances: And to say, that the 24th is a Continuance of the 23d, is what I cannot for my Life comprehend, no more than the 26th can be of the 23d. That it is
a Discontinu-
ance at Com-
mon Law as
to Process to
the Jury.

Then if it can be amended by 8 H. 6. the Words whereof are very general, and the Exception of few Particulars of the highest Nature, and upon full Consideration, I think it cannot; for I cannot imagine that all the Judges and Sages of the Law ever since, would rather in Cases of this Kind rely upon the Common Law, than upon this Statute, except they had taken it clearly that the Statute did not reach to it; and the Reason of that seems to be from the Statute of 14 Ed. 3. the Words whereof are general, but mention the Word Party, which was a good Reason to exclude the King: And of that Opinion is Coke in Blackmore's Case, viz. That the Statute extends not to Pleas of the Crown: It is true, the Statute of Ed. 3. extended only to Process out of the Roll; that is, Writs that issue out of the Record, and not to Proceedings in the Roll it self; and for that 8 H. 6. was made to enlarge the Remedy of 14 Ed. 3. to Process in the Plea-Roll, &c. Which Statute in my Opinion being made in Enlargement of 14 Ed. 3. but not as to the Parties that shall receive the Remedy, but to what Matters more that Remedy shall There must
be a Chain of
Process.

If Statute of Jeofails have to do with this Matter. Vide ante 4, 5, and 269.

The Fault is in the *Teste* of a Judicial Writ, &c.

That the Writ is good, but not to the Purpose, and in a criminal Matter. Vide ante 263. Post 286, 310.

When the Plea-Roll is a Record.

Difference of Process in the Roll, and Process out of the Roll.

shall extend: And the Words [Challenge of Party] in 14 Ed. 3. shall explain 8 H. 6. and it is no new Thing for one Law to be construed in Pursuance and Imitation of a former Law: And thus I hold the Exception of 8 H. 6. is ex abundanti cautela; and that without, no Plea of the Crown had been within that Statute and that Reason which reach the Statute of Jeofails, which have, I own, nothing to do with this Matter; the first of them is that of 32 H. 8. The Words are, between Party and Party; and soon after they would not extend it to Proceedings between Demandant and Vouchee, because the Vouchee is not an original Party: The Exception of the subsequent Statute does not extend to Informations at Common Law: And my Lord Hale in my Lord Bridgwater's Case held, That such Informations were within the Purview; but I never knew any principal Judgment of that Kind; and I rather think that the first Statute of Jeofails extending only to Party and Party, shall interpret all the rest to be so too: And so it was upon the Statute relating to Leases by Bishops, and Ecclesiastical Persons; for they are a Chain of Law relating to the same Matter.

This is a Fault in the *Teste* of a Writ; the *Teste* of an Original is so material, that it is not amendable, and that was Gage's Case: And lately in a Case in the House of Lords, between the Lords Pembroke and Jersey, the same was held by all the Judges; but this is the *Teste* of a Judicial Writ. It has been doubted in Cro. El. 820. whether the *Teste* of a *Ve' fa' o' Distringas* were amendable, and a Difference taken by the Court between a *Teste* and Return of those Writs; for there being no Day named in the Award of the Court for the *Teste*, and there being always a Day certain for the Return, the Variance of the *Teste* was held the Rescience of the Clerk, and therefore not amendable: But notwithstanding, since, they have amended *Testes* as out of Term, after the Return, or on Sundays; but this Writ here is good in itself, though not to this Purpose: And yet I think if it were in a civil Cause, it should be amended by the Award on the Roll, especially the Clerk having declared to us upon Examination, that it was the Writ he intended in Pursuance of the Roll: And there be Authorities to amend the Writ even when it is a good Writ, but not to the Purpose, to adapt it to the Matter, Yelv. 64. So though this be not in itself a naughty Writ, yet if upon Examination of the Clerk it appear'd through Mistake in him not to be ad idem, we would amend it by 8 H. 6. in a civil Matter.

But whether this be amendable at Common Law? There were Amendments at Common Law: If it be called an Amendment, that the Court could alter their Judgments the same Term, though the Record of it were made up; but there though it be enter'd on the Roll, yet the Roll in the same Term is not the Record, but it remains in the Breast of the Judges: But in another Term the Plea-Roll is the Record; and my Lord Coke says, that Mistake of Clerk in Process shall not be amended in another Term: But I think that must be understood of Process in the Roll, and not of Process issuing out of the Roll: As the Case of 29 H. 6. Award was with a *Distringas*, and an *Octo Tales*, and the Entry of a *Distringas* generally; and all

all this being in the same Term, the Court said, This is a Mistake of the Clerks; for we remember'd that we have awarded a Distringas with an Octo Tales, and ordered an Amendment; but the Making out a Process out of the Roll is otherwise, for it never was otherwise in the Breast of the Court, than that they awarded it; and the Clerk's wrong pursuing their Award in making out a Writ with an ill Teste, though in the same Term, is not amendable; nor do I find any Case at Common Law where the Amendments were of Mistakes of Clerks in Issuing of Process, but their Mistakes in Entering the Ass of the Court, or of the Court in Entering Continuances may be amended the same Term, or at any Time after; and so is the Case of Chambers and More now in Levinz.

Clerks Mistakes unamendable, or not. 5 Mod. 398.

3 Lev. 430.

And as to Amendments of criminal Matters at Common Law, I cannot agree with many of them, as Harris's Case for one; so of the Case in Palmer, Plomb's Case, where they supplied ad Com' meum in an Outlawry, for we every Day reverse Outlawries for that Fault; and the Case cited by Yelv. in Bulstrode is so shortly put, that it does not appear in what the singular Number was put for the Plural; but if it were in a material Part of the Indictment, it were hard to amend it: And as to the Case of Sir John Curson, it may be well; for the Issue there was well enter'd in a Docket, but ill on the Plea-Roll, and no more than a Mistake of Entering the Plea-Roll according to the Docket, which did warrant a right Issue: And as to the Case of the King v. Reed, as it is in Keble, the Court were of different Opinions about it: Ve' fa' was against 24, whereof J. S. was one, and a Distringas of J. S. Junior, and the Cause tried by 12, of which J. S. was not one: And Kelynge said, It was amendable: Another would have it only an Explication of the Ven'; and another held it amendable by the Statute of Jeofails, because not within the Exception; but I don't find any Judgment that it was amended; but at last it was looked upon to be no Discontinuance: And he agreed, whatever was amendable in civil Cases at Common Law, would be so in criminal Matter, but that this would not be amended in civil Cases at Common Law; ideo not here.

If what is amendable in civil Cases at Common Law, will be so in a criminal Matter.

Holt acc'. It is not amendable: 1. This is an Omission in a Point material, viz. in the Teste, which by Law should have been the 23d, and not the 24th, for the 23d is the Day the Defendant has in Court upon the Ve' fa'; and therefore the Writ giving further Day, should have issued on that Day.

Per C. J. 'Tis not amendable.

Object. There is no Interval between the 24th and 23d.

Ans. If one is to appear on the 23d, and does appear, and receives no Direction that Day from the Court when he should come again, upon the Expiration of the 23d he is out of Court; Shall you then give him a Day behind his Back? Here indeed he has a Day on the Roll, but the Writ against the Jury issues at a Day after, when the Party and they are out of Court; so it is a Writ awarded behind the Party's Back, and without Warrant of the Court; for the Warrant of the Court is Die Lunæ post Tres Mich',

It is a Writ awarded behind the Party's Back, &c.

Vide 1 Cro.
278, 375.
1 Jo. 302.
'Tis another
Writ than
what the
Court a-
warded.
Ld. Raym.
565.

The Statute
meant to a-
mend bad,
and not to
alter good
Writs.
Ante 263,
284.
Post 310.

This Discon-
tinuance is
help'd by
the Statute.

Testes of Writs
when amend-
able.
See Carth. 76,
172, 367,
506, 520.
Testes, how to
be made.

Where one
must be tested
on the Return
of the other.

Nescience in
the Clerk,
not helped.
Ante 278.
See Skinner
46, 253,
254, 591.
Carth. 70,
76, 172,
652, &c.

and then a Precept is awarded to the Sheriff to distrain, and this Precept issues on the next Day; and is this warranted by the Roll? No sure; therefore being another Writ than what the Court has awarded, it is no Authority to distrain the Jury, and then they had none to try the Cause; for here is a material Variance between the Writ awarded, and that by which the Jury were distrained; the one is the 23d, the other on the 24th, and the Day of the Writ is always the Day of its Teste in Judgment of Law; and he quoted the Case of Owen v. Baily, 17 Car. 2. One recovered Damages in Trover, the Defendant after sold his Goods bona fide; the Plaintiff takes out a Fi' fa' tested the first Day of Trinity Term, which was before the Sale, but taken out after; and held, that the Goods in the Hands of Vendee were bound by it; And by this Amendment, we would make this quite another Writ; for a Writ issuing the 24th, cannot be the Writ awarded the 23d. Suppose this were now immediately after the Statute of H. 6. and before any Statute of Jeofails, Why should this be amended (It is a good Writ in it self, and the Meaning of that Statute was to amend bad Writs, and not to alter a good Writ, so as to adapt it to a particular Purpose: Now to make this a good Trial, you would have us alter this Writ that is very good in its self, and even contrary to Truth make it a Writ of the 23d of October, so to alter the very Nature and Substance of it: Now this being a Discontinuance of Process in a civil Case was help'd by the Statute of 23 H. 8. and since it is not material whether it be amended or not, because the Fault is cured by that Statute, there is no such Amendment as this between the Time of 8 H. 6. and 32 H. 8. It is true, Teste of Writs have been amended; but when? When it was on Sunday, out of Term, or after the Return, which is impossible to be, and therefore a plain Mistake of the Clerk; and upon the same Reason is the Case in Yelv. 64. for there the Distringas bore Teste the same Day with the Ve' fa'; so that the Teste was directly repugnant to the Purport of the Writ it self, which was to distrain the Jury summoned on the Ve' fa', when in Truth no Jury could be summoned: I always have taken it, that if upon Return of one Writ another be awarded, that that other should bear Teste of the Return of the first Writ: And the Case of Bradley and Banks is very strong in that Point, and the common Practice of the Common Pleas is so, though it be not so much observed here in Writs of Inquiry of Damages; the one Process there is always tested on the Day of the Return of the last, whether it be Capias in Outlawry, or Distress infinite; the one must be tested on the Return of the other, or else all is discontinued: Ay, but this is a Mistake of the Clerk; but we are to judge, whether it be not a Mistake in Point of Skill? Who can tell? Every Clerk does not know; and some pretend it need not be tested on the Day of the Award; Why then shall we look upon this to be a Fault in Point of Computation, rather than that he thought it good? And if it be Nescience in the Clerk, it is not help'd even by the Statute of H. 6. though a civil Case, before the Statute of Jeofails: And he held a new Ve' must go, for a new Distringas would not do; for the first Ve' fa' is executed; and the Jury have now tried the Defendant,

and

and that appears on Record here, and the now Ve. fa. is ipso Facto discharged, only an Entry to be made on the Roll, quia apparet Cur. that the Distringas did not issue till the 24th. Ideo consideratum est quod cassetur, and Ve. fa. de novo awarded.

Note; Powys recanted instantly, and Gould hæsitabat.

The Parish of St. Clements *versus* that of St. Andrew. 1 Salk. 606.
S. C.

O An Appeal by one Parish from an Order of Justices for the Removal of a poor Person from the other Parish to them, at the Beginning of the Sessions the Order was confirm'd; and after the same Sessions, another Order was made for the Reversal of the original Order. Order for removing a poor Person confirm'd at the Sessions on an Appeal, &c.

And a Certiorari being now brought, the Order of Confirmation, and also the Order of Reversal, were both returned. Ante 87, 88, 163.
Ld. Raym. 254. Stra. 6,

394, 425. Cas. temp. W. 3. 20, 203, 376, 402, 403, 419, 548, 559, 633, 668. Fitz. G. 254. Stra. 6, 1263, 1168.

Et per Cur. 1. The Judgment of the Justices is in their Breast, and alterable by them all the same Sessions. Ante 269.
2 Salk. 496,
524, 534,
606.

2. If they make a subsequent Order directly contrary to a former of the same Sessions in the same Cause, the subsequent one is an absolute Repeal of the former, being inconsistent with it, tho' there be no express Words of Repeal in the second Order: As if at the Old Baily, &c. one indicted of Felony will not plead, and Judgment of Peine fort & dure be given against him, and he is carried away, and the next Day he alters his Mind, he shall be admitted to plead; and if he be convicted, he shall have Judgment to be hanged, which is a Superseas or setting aside of the first Judgment. 1 Cro. 341.
1 Jo. 330.
1 Cro. 350,
351.

And Powell said, If there be two Acts of Parliament directly contrary one to another the same Sessions, the last should only be taken for Law.

But Holt, Ch. J. If they both should generally refer to the same Sessions, I don't know which to take for Law. Resp. That which is most consonant to Common Law.

And he quoted a Case of the Town of Colchester here some Years ago exactly like this, and for that the second Order did not expressly repeal the first Order, and that the Justices did return them both as Orders; the second Order was quash'd, and the first set up. And the Chief Justice put a Case that was in Chancery a Day or two before, which was this: An Appeal from a Decree of the Master of the Rolls, and the Question was, Whether new Evidence that had arisen between the said hearing and Decree and the Appeal, should be received? And it was held by the Lord Keeper, Justice Powell, and the Chief Justice, That all the Matter at the Rolls had fallen to the Ground upon the Appeal, and it was now the same Thing as if nothing had ever been done in it, and by Consequence the new Evidence ought to be admitted; but at last the Matter here by Consent was referred to the Three Judges, or any Two of them, to arbitrate. 2 Mod. 72.
10 Co. 101.
Upon Appeal, former Order fails.

Booth

Booth *versus* Booth.

1 Salk. 322.
S. C.

See the Case
of *Dillon and*
Brown.

Ante 14.

If a *Cesset*

Executio be

for a Year,

Execution

may be with-

in the next

Year without

Sci. fa. &c.

Vide 1 Salk.

258.

3 Mod. 187,

189.

Post 292,

296.

Ante 14, 212.

Caf. temp.

W. 3. 377.

506, 541.

3 Wms. 36.

1 Barnes 132.

2 Barnes 165, 166, 172.

Stra. 100, 301.

But the Court

won't take

Notice of

Chancery In-

junctions.

Vide ante 14,

130.

Judgment, with an Agreement to stay Execution for 3 Months, within which Time the Defendant obtained an Injunction in Chancery against the Plaintiff, so that he could not take out Execution till after a Year, and then he took out an Elegit without a *Sci. fa.* and had it executed; and the Doubt was, If the Execution were not irregular. Q. N. L. W. 184.

Serjeant Powys and Cowper: That it was not. If the *Cesset Executio* were for a Year after the Judgment, yet the Plaintiff within the next Year might take Execution without a *Sci. fa.* Quod fuit concessum. So if the Defendant bring Writ of Error, and hangs up the Plaintiff for a Year, and then is nonsuit, he may take out an Execution without a *Sci. fa.* So here, if before the Time of the Agreement be out the Defendant ties us up by his own Act, so as we dare not take out Execution within the Time, Shall he take Advantage of his own Wrong, by putting us in a worse Condition?

But per Cur. This Practice is against a manifest Rule of Law, to take out Execution after the Year without a *Sci. fa.* and we cannot take Notice of your Chancery Injunctions. Besides, it had been no Breach of such Injunction to take out a Writ of Execution within the Time, which might have saved the Trouble of a *Sci. fa.* after the Year, by entering the Continuance down by a Vic' non misit Breve; but that we cannot suffer to be done now, a Writ not being taken out in due Time; and if we should let this Judgment stand, it would be an erroneous one, and therefore reversible by Writ of Error; therefore let a Superfedeas go, Quia improvide eman'.

Note; That there never is a *Cesset Executio* entered on the Roll.

S. C. Ld.
Raym. 1116.

Domina Regina *versus* Collingwood.

Indictment
for enticing
an Apprentice
to take away
his Master's
Goods.

Vide ante 99,

182, and

1 Salk. 380.

Caf. temp.

W. 3. 195.

It was an Indictment, and conceived thus: Jurat', &c. presentant Quod T. C. nuper, &c. existens Persona malæ Dispositionis ac non intendens Victum suum per Labores honestos quarere, sed machinans & intendens Servientes & Apprenticios honestorum Civium & Inhabitant' Civ' London in Moribus & Statu suis prægravare & destruere, ipse præd' T. C. vicesimo Die Martii, Anno, &c. And diversis aliis Diebus tunc antea, apud London viz. in Paroch' S. B. in Warda de D. London. præd' quendam C. S. Servientem & Apprenticiam cujusdam R. T. de London, Warehouse-keeper, illicite, injuste, & nequiter movit, seduxit, & allexit, sexcent' septuagint' duas Virgatas Panni Lanei, vocat' Callamancoes, Valor' vi l. de Bonis & Catallis præfat' R. T. extra præd' Domum & Shopam ipsius R. illicite, injuste & nequiter capere & asportare Et quod præd' T. C. dicto xx Die, &c. Anno, &c. supradict' & diversis aliis

aliis Diebus & Vicibus, Bona & Catalla præd' a præd' C. S. Servient' & Apprenticio præd' R. T. adtunc & ib'm apud dict' Paroch' B. &c. illi- cite, injuste & nequitur, cepit, recepit, habuit, & ad Usus proprium ipsius T. C. convertit, eodem T. C. adtunc & dictis aliis Diebus & Vicibus bene scient' præd' C. S. fore Servient' & Apprenticiu præfat' R. T. ad grave Damnum ipsius R. T. in malum Exemplum omn' aliorum in consimili Casu Delinquentium, contra Pacem D'næ Regin' nunc Coron' & Dignitat' suam.

After Conviction, several Exceptions were taken by Montague:

1. That it was not directly said, that the Apprentice did actually take away the Goods, but only that the Defendant did intice him to take them away, and did receive them from him; which is a strong Argument indeed that they were taken away, but no direct positive Charge, as the Fact ought to be laid in an Indictment. And for this he relied on the Case of the Queen *versus* Daniell, hic ante fol. 99, 101, 182. 2 Roll. Abr. 79. K. Exception, That the Charge is not positive, as it ought to be. Keilway 87.
2. Not said where the House and Shop of R. T. is, and by Consequence no Venue where the supposed Taking by the Apprentice was.

Per Cur. The Indictment upon the Case of the Queen *versus* Daniell went upon two Points; the one was, for seducing an Apprentice from his Master; the other for perswading him to take away his Goods. As to the first, which was the only Point in Judgment, we held the Offence not indictable; and there was no Venue laid for the second. Vid. ante 99. 182. 1 Salk. 380. S. C.

And they all were of Opinion the Charge ought to be direct, and not argumentative; and that it was not enough to lay an Inticement, without an Act done in Pursuance of it. And you shew here a special Matter, viz. That the Defendant did receive them, but do not shew that they were taken away; and if this were Felony, as you here shew it, the Defendant would only be accessory, and that could not be without a principal Fact committed. Here indeed you might have charged him as a Principal, for he that perswades another to commit a Trespass is a Principal, and the Taking of the Apprentice here is the Taking of the Defendant; but you do not shew where that was. Per Cur^a, The Charge ought to be direct, and not Argumentative. 2 Roll. Abr. 79. K.

And per Omnes. It cannot be maintained, but gave them Time till next Term to see to maintain it. Adjournatur.

S. C. Ld. Ray.

1072.

S. C. 1 Salk.

322.

Clerk *versus* Withers.

An Admini-
strator in C. B.
recovers a
Judgment by
Default against
Clerk, (upon a
Bond to his
Intestate) &c.
Vid. post 291,
292, &c.

Ld. Raym.

244, 245,

252, 40.

Caf. temp.

W. 3. 604.

THE Case was thus: F. D. as Administrator of J. D. recovered 303 l. against C. upon a Bond to his Intestate, upon Judgment by Default in the C. P. and sued out a Fi. fa. tested of Trin. 1 Annæ, returnable Tres Mich. directed to the Sheriffs of London, which was delivered to the Sheriff the first of August the same Year, who on the same first of August seized Goods to the Value. F. D. the Administrator, died the 9th of September following: The Sheriff returns the Seizure to the Value, sed remanent, &c. pro Defectu Emp-
torum. The 29th of September the Sheriff is removed, and another put in. The Plaintiff Clerk now sues Sci. fa. against the then Sheriff for Restitution of his Goods, and upon Demurrer, Judgment against the Plaintiff in the Common Pleas, and Writ of Error.

And now the Case having been twice solemnly argued at the Bar, the Court seriatim affirmed the Judgment.

And at the Bar, Three Points were insisted on for the Plaintiff in Error:

1. That in this Case the Property remained still in him.
2. That his proper Remedy was a Sci. fa.
3. That the Defendant's Plea (viz. That he was bound to sell the Goods, and compellable so to do by a Distringas nup' Vic' Com') was not a good Plea.

And Two Things were said to be considerable in the first Point, viz. the Death of the Intestate's Administrator before Sale; and likewise the Removal of the Sheriff and his Return. It is not to be controverted, but that if a Man has Judgment, and sues Fi. fa. and Goods are seized, and then the Plaintiff dies, the Sheriff is bound to sell, and give the Money to his Executor or Administrator; but here, as was urged, there is none that can sue out Process to compel the Sheriff to sell, or to perfect this inchoate Execution, because none is privy to the Administrator; for his own Executor cannot do it, because it was in Auter droit, and the Administrators de Bonis non are not privy to the Plaintiff, but immediately from the first Intestate: And for this Reason it was, that such an Administrator could not at Common Law sue Execution upon a Judgment obtained by the Executor or Administrator of his intestate. Vide Yely. 83. 2 Cro. 4. which Mischief is now remedied by the Statute of 27 Car. 2. c. 8. where Executor or Administrator have Judgment after Verdict, and die before Execution sued out, the Administrator de Bonis non may sue Execution; which Statute extends not to this Case, being by Default: Besides, that Statute enables them to revive such Judgment by Sci. fa. but takes no Care to perfect Executions commenced only, but not perfected. And the Seizure by the Sheriff does not alter the Nature of the Debt, but that it remains still a Chose in Action,

Remedy for
Administrator
de Bonis non,
by Stat. 17
Car. 2. after a
Verdict.

Action, and of the Nature of the Bond on which the first Suit was. And then it is as if no Execution had been sued; in which Case the Administrator de Bonis non could not sue Execution, even by Sci. fa. upon the Statute. Ideo the Property remains in the Plaintiff. And if the Sheriff be not compellable to sell by Process at the Suit of this Administrator, sure he cannot sell at all; for it would be very odd to say, that it should be at the Election of the Sheriff whether he would sell or not.

And this is not like the Case in 1 Siderfin 29. where an Executor had Judgment, and after took an Elegit, and died intestate before the Debt levied; and held the Administrator de Bonis non should have the Benefit of it; for here was a compleat Execution, which ought not to determine by the Death of the Executor intestate: But here there was nothing compleat, nor can the Administrator take these Goods in Satisfaction of his Debt. And none then has Right to them but the Plaintiff. Vide 1 Jo. 385. Cro. Car. 487. Executor sues an Extent upon a Statute Staple, and the Writ is returned served; but the Plaintiff dies intestate before a Liberate sued out. And held per Cur' against Cro. That the Administrator de Bonis non cannot proceed upon this Execution, he being not p'vby to the Executor that sued out the Extent so in the principal Case; and like P'vity is necessary to have a Venditioni exponas as to a Liberate.

Obj. That the Sheriff cannot now sell, the Execution not being compleat, &c. Vide 1 Cro. 208, 227. Cro. El. 319. 451, 457, 459, 639. 1 Co. 96. 1 Jo. 248, 386. Cro. Jac. 4, 194. Yel. 33.

The general Property of the Goods must continue in the Defendant, for the Sheriff has it not; for by Grant of all his Goods these would not pass, nor would they be forfeited by a Felony or Outlawry of the Sheriff as his own Goods would be: And he only has a Power to sell them, as a Commissioner of Bankruptcy to sell Goods of Bankrupt, and his having them in Possession enlarges not his Property. Dyer 99. That Property is not altered by the Seizure. And if after the Seizure the Defendant had paid the Money, he might have taken his Goods again without any Grant to be made by the Sheriff, and Trover would lie against the Sheriff for detaining the Goods after such Payment. Indeed, the special Property may be in the Sheriff for his Safety. Vide 1 Vent. 52. 2 Saund. 47. He may bring Trover for such Goods against a Stranger, as a Carrier may for Goods given him to carry; and the Reason in both Cases is the same, viz. for their Safety, they being both answerable over to the general Owners. If Goods in Execution perish without Default of the Sheriff, it is the Loss of the Defendant, which shews the Property to be in him; for if it were not, Why should it be his Loss? And as it was urged, the Party could be sued de novo for this Debt by Administrator de Bonis non; ideo he ought to have his Goods again, that he might not be twice charged. The Party is not discharged by the Sheriff's Return, That he seized Goods to the Value; nor is the Sheriff by such Return chargeable, for the Sheriff had done but his Duty. 2 Saund. 344, 345. And there would be no Inconvenience in restoring those Goods, for here were Laches in the other Side, for they might have taken an Assignment of the Goods immediately upon the Seizure.

That the Property continu'd in the Defendant, and Sheriff not chargeable.

1 Sid. 438.
1 Ro. 4.
1 Lev. 282.
2 Keb. 588.
2 Saund. 47, 345.
1 Mod. 12, 30.

And he quoted Yel. 44. Mo. 757. 1 Ro. Ab. 894. That Sheriff after Amobal could not sell. Sed tora Cur' contra. Vi. idem 2 Cro. 73.

That a *Sci. fa.* was the proper Remedy.

And this is a very proper Remedy for the Plaintiff, for the Sheriff's Return of Seizure of the Goods, and that Remanent pro Defectu Emptorum is enough to ground a *Sci' fa'* upon: Quod fuit concessum, if the Execution were determined by the Death of the Party Administrator.

R. That the Defendant was discharged by the Seizure, and no Reason he should have his Goods again.

1 Salk. 320, 323. Vi. Mo. 402. Cro. Eliz. 390. Cro. Car. 459, 487.

Raymond contra. The Defendant is discharged by this Seizure to the Value of the Debt, and therefore no Reason he should have his Goods again.

That a *Distringas* lies against Sheriff.

2 Saund. 47, 345. 1 Sid. 438. 1 Mod. 12, 40. 1 Vent. 52. 1 Lev. 282. 1 Mod. 12, 30. Post 298. 1 Ro. 4.

At Common Law his Goods were so bound by the Teste of the *Fi' fa'* that himself could not after alter the Property of them. 1 Leon. 304. Cro. El. 174. but now, as to a Stranger, it has not that Operation. Mich. 9 W. 3. Smalcombe v. Crosse. Two Executions, one tested before the other; the last first delivered to the Sheriff: And held the Sheriff ought to execute that which was first delivered to him, but if he executes the last, the Execution is good, but the Party has his Remedy against the Sheriff; but as to the Party himself, his Goods are bound by the Teste. 2 Ro. Rep. 57. If the Sheriff seises to the Value of the Debt, the Defendant is discharged, tho' the Sheriff does not satisfy the Plaintiff; and the Plaintiff cannot sue out a new Execution, for the Sheriff by the Seizure becomes liable to him. 20 H. 6. 24. the same. If the Sheriff will not make a Return, it is a Contempt of the Court, for which they will deal with him; and if he returns the Truth, the proper Remedy is a *Distringas nuper Vicecomitem*. 43 H. 36. a. Fitz. Process 89. And by the Case of Wilbram and Snow, in 2 Saund. the Sheriff after his Office determined may sell by a *Venditioni exponas*, Noy 73. Execution was sued out, and Goods seised, after the Party died, and it was doubted what should be done with the Goods, and ruled it should be brought into Court.

And the Sheriff by Seizure gains a Property, and is answerable for Rescous, and other Casualties. He may have *Crespals* against the Party himself, Cro. El. 638. and Crover, Vide 1 Vent. 52. 1 Sid. 438. and 2 Saund. 47, &c. ubi supra.

C. J. 'Tis material who ought to have the Goods, since Stat. 17 Car 2.

Holt, Ch. J. It is material who ought to have them, for if there be none who can make Title to them by Vertue of this Execution, the first Owner ought to have Restitution. If this were before 17 Car. 2. he should it seems have them back; so the Doubt is, Whether he will bring this Case within the Equity of that Statute? And the Case of 1 Sid. does not come up to this, for the Lands were actually extended and delivered before the Administrator died, and nothing more remained to be done, but the very having Administration de Bonis non vests it in him; but the Question here is, Whether the Administrator de Bonis non can pursue this inchoate Execution by a *Distringas nuper Vicec'*: And if he cannot do that, it will necessarily follow that there ought to be Restitution. It is true, if Goods

to

to the Value of the Debt he seized, tho' the Writ be not returned, that does discharge the Defendant, unless the Execution be after avoided; so that the Seizure, as long as it continues, is a sufficient Bar. Suppose then it cannot be carried on for Want of Privy, for he might have begun again before the Statute of 17 Car. 2. if there had been a Verdict, it might well be judged within the Reason of that Statute. If the Administrator had died before the Seizure, would not the Writ abate? If the Sheriff had sold, and before Payment Administrator died, should not Administrator de Bonis non have Debt against the Sheriff? Sure he shall; for now here is a new Debt arises to the Administrator, as he is Administrator; it may be he has not Privy enough to sue Process; but he shall have Debt, and compel the Sheriff to make Return in order to bring his Action.

And it seems
he may have
Debt.

If Goods be taken on a Fi' fa', and Writ of Error is brought, and a Superfedeas come before Sale, yet the Sheriff shall sell, Dyer 99. tho' 2 Roll. Abr. 291. be contra; after Seizure, and Writ of Error and Superfedeas, a Venditioni exponas shall go: If Sheriff seize Goods to Value, and returns it, he is bound to find Buyers, or else why should a Distringas go against him to sell them to the Value? For a Distringas is a compulsory Writ to sell at the Value, upon Pain of Forfeiture of Issues: And if he be so compellable to sell, Why should not Debt lie against him? And Vide the Case of Smith v. Martin, in 2 Saund. and if Goods be rescued from him, he is not liable, for it is not the Rescous, but the Return that makes him liable, that is, the Return of seizing Goods to the Value; therefore he ought to seize a convenient Quantity to enable him to return a Seizure to Value with Safety: And the Sheriff, by his Return, is charged to the Value at all Events, except the Act of God.

Vide 1 Salk.

12, 318, 320,

322, 323.

2 Keb. 257.

2 Saund. 400.

Powell. It is clear by the Book of 34 H. 6. if Sheriff return that he has Goods in his Hands for Want of Buyers, and is after avoided, a Distringas shall go to the new Sheriff to distrain the old Sheriff to sell the Goods, and give him the Money to bring it into Court; if the Goods were rescued out of his Hands, Debt would lie against him; but if there be no Default against him in not selling of the Goods, it were hard if the Action should lie against him. It is true, by levying the Goods, whether they be sold or not, or a Return be made or not, the Defendant is discharged; for if a new Debt be brought against him, he may plead that it was raised by Fi' fa'. And sure the Property by the Execution is out of the Defendant, whose Goods they were; but if by any Accident the Execution determine, he shall have them again: Who then has the general Property in the Interim? I cannot tell but it may be in Abeyance: And he said, the Return did not make him liable to Debt; if this were after Verdict, the Statute would have clearly helped it.

R. That upon
this Return a
Distringas
shall go.

1. Defendant
discharged,
and Property
out of him.

2. If the Pro-
perty be not in
Abeyance, &c.

In the second Argument for the Plaintiff, three Things were urged:

2. Argument.

1. That Debt after such Return, as here, would not lie by Administrator de Bonis non against the Sheriff.

Administ. de
bonis non, Vid.
post 300.

2. Not in any Case.

3. Tho' it were a Chose in Action in Right of the first Intestate, yet in this Case it would not be so.

Obj. That the Right never vested in the first Administrator.

If the Action did lie by the Administrator de Bonis non, it must be upon the Seisin and Return of the Sheriff; but before the Return was made, the Administrator died, as appears by the Record, and therefore the Right of Action never vested in the first Administrator: And it never having vested in any under whom he may derive it, it is not such a Chose in Action as he can take the Advantage of.

And that Debt lies not upon this Return. Vide 1 Sid. 29, 79. Hob. 10. 8 Co. 136. 1 Keb. 313. 1 Jo. 345. Rule of Action for Damages. Cro. Car. 149, 150, 187, 200.

2. The Sheriff being a publick Officer, the Court will be tender of charging him with Actions without apparent Default in him; for if he return *Cepi Corpus & Paratum habeo*, and it appear to the Court, that there is no Default in him in not having him forthcoming, Action will not lie. Vide Cro. Jac. 514. 2 Roll. Rep. 57. And if *Sci' fa'* would not have lain upon a Judgment by an Administrator of Executor, or Administrator of another, a fortiori Debt will not lie for him for Want of Privy: Vide 1 Sid. 407. If Sheriff return, that he has levied the Money, he shall not be excused from Debt, because he might have paid it over. 2 Saund. 247. Debt lies not against Sheriff upon his Return, when he does not misbehave himself; it is a Rule, That one shall never have an Action for Damages for a Thing, till he has Right to the Thing it self. Vide Cro. Car. 176, 177. 1 Jo. 215. Money in Sheriff's Hands was assigned by Commissioner of Bankrupt, and void because it was not the Bankrupt's Money; a fortiori in this Case.

That the Statute helps not in the Case upon an equitable Construction.

3. The Statute of 17 Car. 2. does not help this Case: The Rule upon equitable Construction of a Statute is, That whatever is within the Reason and Equity of the Statute, tho' it be not expressed, shall be adjudged within the Remedy as if actually expressed: As if several Particulars be enumerated, and one of like Reason and Mischief omitted, it shall extend to it as much as if it had been expressed: And 17 Car. 2. is calculated to a particular Purpose, that is, to give Administrator de Bonis non Execution upon a Judgment obtained by an Executor or Administrator, that is, to save him the Benefit of the Judgment, which generally is not obtained without great Charges and Delay; but had no Regard to Executions commenced, viz. to save the Benefit of them.

R. That *Fi' fa'* &c. need no Return.

Dee contra. *Fi' fa'*, or *Capias*, need no Return to make them good, as *Elegit* does, because an Inquisition is necessary to be taken in that Process, which is not so in the other 1st and 2d. 1 Sid. 99. If Goods be seized upon in the Life of Administrator, who dies before Sale, Administrator de Bonis non shall have Advantage of that Execution, but the Book does not say how: Mo. 402. Cro. El. 319. and Yelv.—The Sheriff may and ought to sell the Goods without a *Venditioni exponas*; besides, there is no Body in Court to inform them that the Party is dead; and if so, the Court ex Officio ought to award a *Venditioni exponas* upon the Return here made; that is, when the Sheriff informs the Court that he was commenced, but not perfected the Execution, whether

That the Sheriff may sell without a *Venditioni exponas*.

whether the Court will not command him to perfect it? And an Administrator de Bonis non would have an Action of False Return against the Sheriff; a fortiori will it be in such Case where the Plaintiff charges himself with a Duty to the first Testator; and that this general Return does charge with a Duty to the first Testator, appears from this; That after such Return, he cannot upon Venditioni exponas return that he sold for less: If indeed he had returned a special Seizure, and mentioned the Goods in particular, and they appear to be bona peritura, he may return upon the Venditioni exponas, that he sold for less than the Debt. And tho' the Words [after Verdict] be in the Statute of 17 Car. 2. yet sure the Statute shall extend to other Cases than such as are after Verdict; as if the Judgment be by Confession, and this is such a Mischief as the Makers of that Statute meant to avoid, as appears by the Title and Preamble thereof: And for equitable Constructions, he quoted 2 Inst. 429. Bro. Bar. 50. Hale's placitorum 23. Dyer 186. Besides, this Writ is wrong in it self, for the Sheriff may and ought to sell the Goods without a Venditioni exponas; and all the Writ suggests is, that he took the Goods, but does not say he had them at the Time of the Writ purchased; whereas it should suggest, that they still remain in his Custody.

That the Sheriff has charged himself, and how.

That the Statute shall extend to other Cases.

Fault in the *Sci' fa'*.

2. They don't tell what the Goods are, that in case there be Judgment, Execution may be thereupon.

Holt, Ch. Just. As to that Fault in the Writ, in not suggesting that the Goods remained in his Hands, it might be fatal, if it were not helped by your Plea, viz. That you are compellable to sell them by a Distringas, &c. which admits you have them; the great Question is, Whether the Sheriff by actual Seizure has not vested such actual Right in the Administrator, that in case he had died, the other might have Action? If he had sold the Goods, and before Payment the Administrator dies, yet by that there is such a Right in the Administrator as Administrator, and that Right goes to the second Administrator, who represents the Intestate in whose Right the first Administrator had it: And the Sheriff out of Office may sell without a Venditioni exponas, otherwise why should a Distringas go to the new Sheriff to command the old Sheriff to sell? There are two Sorts of these Distringas's nup' Vic', the one according to 34 H. 6. Rast. 164. Thesaur' Brevium 90. the one to command the old Sheriff to sell, and bring the Money into Court; the other to command him to sell, and to deliver the Money to the new Sheriff. Now this Distringas does not give him an Authority to sell, but is compulsive upon him to sell; and if he don't, he forfeits Issues toties quoties: And when the Sheriff returns Seizure ad Valentiam, and remanent pro defectu Emptorum, that is, only that the Law gives him a convenient Time to sell; and if he continues in his Office, a Venditioni exponas shall go; and if he be out of his Office, a Distringas nuper Vicecom' goes to the new Sheriff to distrain the old Sheriff to sell, &c. as is said before. Now then when he has returned a Seizure to value, and that

C. J. Fault of the Writ is helped by the Plea. What the great Question is.

That Sheriff may sell without a Venditioni exponas, and when.

And a Distringas is compulsive upon him.

He shall not
always keep
the Goods for
Want of Buy-
ers.

2 Saund. 343.
2 Keb. 789,
821.
Vide 1 Cro.
539.
2 Cro. 514,
555, 566.
Mo. 468.
Godb. 276.
Debt lies
against him
upon Seizure
returned.
Of Equity by
the Statute.

Administrator
de Bonis non
may perfect
the Execution,
&c.
5 Mod. 384.
Post 298.

Where and
how Issue in
Tail may fal-
sify a Reco-
very, &c.

Ld. Raym.
1051.
Cas. temp.
Mac. 412,
413, 414.

Whether Acti-
on will lie for
Administrator,
upon Sheriff's
having Goods
to the Value,
&c.

that he is compellable to sell under Penalty of forfeiting Issues, it is an immediate Charge upon him even to the Value of the Goods: It is true, 'tis a good Return for him to the first Fi' fa', that he has seized to Value, and that they remain in his Hands for Want of Buyers, for he has convenient Time to sell, but he shall not always keep them in his Hands for want of Buyers; for he cannot return upon a Distingas, that the Goods remain in his Hands for want of Buyers: If they be perishable Goods, or that the Act of God intervene, he may plead that as a Reason for selling them at an under Rate, and for less than the Value of the Debt.

Sci' fa' against the Sheriff upon Return of Goods seized to Value of Debt; and he pleaded a Rescous, and not good: And he quoted the Case of Mildmay and Smith, that Debt lies against him upon such Seisin returned, after the Goods are rescued from him: And what is the Gift of the Action? Not the Rescous, but the Sheriff's having Goods to the Value: Then it is hard to say, that the Sheriff is not liable to the Administrator; and if so, there is no Colour for this Sci' fa'. But to the Equity of the Statute of 27 Car. 2. where the Statute does make the Distinction of a Verdict, it is hard to carry it farther; but this does not appear on the Sci' fa' not to have been after Verdict; for it is only said, that Action was brought by the Administrator, in which taliter Processum fuit, that he obtained Judgment. And if this had appear'd to have been after Verdict, without all Doubt the Statute would have reached to it, since Administrator de Bonis non may thereby commence an Execution upon a Judgment by a prior Executor, &c. a fortiori he may perfect an Execution commenced by him: And though you say, That the Writ is bad in not mentioning the Goods in particular, of which Restitution is demanded; sure that is not so; for if Goods be taken in Execution, and before Sale Judgment is reversed, there shall be a Writ of Restitution without particularizing.

And as to the Statute of W. 2. de Religiosis, being taken by Equity, there the Word Default is a Default in Court; not only by not appearing, but also in not pleading, or plead faintly, &c. by Collusion. Suppose Tenant in Tail suffers a Recovery, and dies, the Issue may falsify this, that is, he shall not falsify the very Point tried; but he shall say, That his Ancestor might have given such and such Evidence in Maintenance of his Title, and omitted to do it: And if a Writ of Entry in the Post be brought, and Issue is, whether J. S. died seised or not, and it is found against Tenant in Tail, his Issue after him shall not come and say, That he did not die seised; but he may come and say, That such Evidence might have been given in Maintenance of the Title: And if the Goods could be restored here, the Sci' fa' would be very proper, and need not be more special than the Sheriff's Return is on which it is grounded: And no Doubt, if the Goods had been sold, the Administrator might have an Action for the Money; but whether it will lie upon his having Goods to the Value, is considerable.

Powell. This is a new Case; but if this Writ be proper and reasonable, its Novelty is no Exception to it, for there is a Time for every Thing to begin; if none has Right to challenge the Sheriff in Right of the original Plaintiff, the Defendant ought to have the Goods again: If this had been Detinue, the Goods must have been particularly mentioned; but it may well be, that this Sci'fa ought not to vary from the Return: If it be not after Verdict, it cannot be within the Equity of 17 Car. 2. nor is it like the Cases upon the Statute of Religiosis; for there the Fraud is the Thing design'd to be prevented: And the Case quoted out of Hale's Pleas of the Crown, is not by an equitable Construction of the Stat. of 25 Ed. 3. Petit Treason, but is within the Letter of it; for M^rs. is a Master: So it seems to turn much upon the Judgment in Stiles and Finch's Case, where the Sheriff return'd a Rescous, and the Action was maintained against him; but I cannot tell whether the having the Goods in his Hands, or the suffering them through his Default to be carried from him by Force, be the Gist of the Action: He agreed, the Venditioni exponas, or Distringas, were not as Powers or Authorities to sell, but a Command to do that which he had Power, and ought to do before; for the Sheriff is bound to sell, but that must be in convenient Time; But what sticks with me is, that if such Action would lie upon such a Return as here, and the Sheriff sells as soon as he can, and by Casualty cannot sell to the Value, whether he cannot plead this Matter?

Per Powell,
This is a new Case; and if it is not after Verdict, not within 17 Car. 2. &c.

Stat. de Religiosis.

Case of a Rescous return'd.

Vend' exponas, or Distringas, but a Command, &c.

What if Sheriff cannot sell to the Value.

Cur' Per Gould,
Clerk is discharged of the Debt.

*1 Cro. 328.
1 Jo. 326.
Ibid. 430.
1 Cro. 539.*

*The Sheriff may sell, tho' out of his Office, by Virtue of the Fi'fa' &c.
1 Salk. 323.
Cas. temp. An. 34.*

An Administrator de Bonis non shall have the Money.

*See Skinner 143, 232, 650.
Vide 1 Vent. 41. Simile.*

Now per totam Cur' Jud' affirm'. Gould: It is plain the Plaintiff's Clerk is discharged of the Debt by the Seizure of Goods to the Value, and may plead that Matter in his Discharge; if the Money had been levied by Sale, he might do it. 1 Lutw. 588. Langdrew *versus* Wallace. And if the Money be not levied, but Goods to the Value seized, he may plead that his Goods, ad Valentiam, &c. were seiz'd by Virtue of a Writ. 3 Cro. 237, 208, 390. Dilk's Case, Trin. 36 Car. 2. Rot. 504.

Debt upon Bond, in which two were jointly and severally bound against one of the Obligors, who pleaded a Judgment had against his Co-obligor, and a Fi'fa' thereupon, and Goods seized to Value, but no Return made; and it was adjudged, That if the former Action were against himself, it had been a good Plea, but the Doubt was, because it was against another: And that the Sheriff may sell the Goods, though out of his Office, by Virtue of the Fi'fa', Vid. 2 Cro. 73. and then he may bring the Money into Court, and then it is to remain here till the Administrator de Bonis non shall come and take it, Noy 72, 73. If Fi'fa' be sued out, and the Plaintiff dies, and then Sheriff levies the Money, and brings it into Court, it shall there remain till Administration sued out, and then Administrator shall have it: So if Fi'fa' be sued out, and the Goods are seized, and the Plaintiff dies before Sale, and then the Goods are sold, Administrator shall have the Money; and it is no good Return to say, That the Plaintiff is dead, for that does not abate the Writ, Vid. 1 Cro. Clere's Case; in which it is agreed, that if there be Extendi Facias by Administrator, and upon the Return thereof a Liberate issues in his Life-time, and he dies be-

1 Sid. 29.
Yel. 33.
1 Cro. 208,
227, 451,
457, &c.
Sheriff by
Seizure gains
a special Pro-
perty.
Mo. 757.
Cro. 73.
3 Cro. 639.
Vide 1 Vent.
52.
1 Lev. 282.
1 Sid. 438.
1 Mod. 12, 30.
2 Keb. 588.
2 Saund. 47,
345.
Ante 292.
Where Ad-
ministratoꝝ de
Bonis non may
have Debt
against She-
riff.
That this
Execution
vests a Pro-
perty, &c.
Vide Dyer
76. b.
3 Cro. 181.
5 Mod. 384.
Ante 296.
Cas. temp.
W. 3. 604.

Just. Powell
acc', and that
Plaintiff shall
not have his
Goods again.
Cas. temp.
Mac. 270,
307.

Vide 1 Vent.
41, 42.

foze Execution of the Liberate; yet the Administratoꝝ de Bonis non shall have Benefit of it, 1 Jo. 386. simile 1 Sid. Harrison and Bowden's Case: So here Execution is executed in the Life of Administratoꝝ; the Sale, viz. the formal Part, may be done by Virtue of the same Writ: Then the Sheriff by levying of Goods by Fi' fa', as he seizes the Goods, gets a Property in them against all Persons, and may have Trespass against the true Owner if he should retake them, 3 Cro. 639. and so he may have Trover, as appears in Wilbraham and Snow's Case, where Kelynge held, That he gains a general Property; but all the rest say, It was only a special Property so as to sell, &c.

If the Sheriff had return'd, That he levied to the Value of 100l. he thereby charges himself with so much Money; that Debt for so much would lie for the Administratoꝝ de Bonis non: And this is not like the Case put before of an Extent; for in that Case there must be a Liberate, which is by Award of the Court.

Powys accord. Executions are favour'd in Law; and this Execution is so far compleated, that it is a vesting of a Property in the Sheriff, and the selling is but a formal Part of the Execution, and by the Seizure and Writ he has Authority to sell; and the Venditioni exponas adds not to his Authority, but is to spur him on to sell; and the Goods by the Seizure are in custodia Legis, and the Case in 1 Sid. 29. is stronger than this, where the very Taking out of a Writ of Fi' fa' is said to be vesting of the Goods in the Administratoꝝ, as Administratoꝝ de Bonis non may take Advantage of: And he relied on Noy 73.

Powel accord. The Plaintiff in this Sci' fa' shall not have the Goods again, because the Execution was executed in the former Administratoꝝ's Life-time, and his Death shall not abate the Writ: Now it would have been if it were not executed in the Party's Life-time, I shall not say: Execution is an intire Thing, and therefore where Sheriff levies Goods, and while they remain in his Hands for Sale, a new Sheriff is chose, he that begun the Execution shall go on with it, and sell the Goods, and not deliver them over to the new Sheriff, who is the Officer of the Court; and the Reason is, that Execution is one entire Thing, 34 H. 6. 36. and therefore where it begun it shall end; and that is the Reason that a Superseas, after Execution begun, shall not supersede it upon a Writ of Error, because it is an Execution from the first levying of the Goods; and not like the Case of an Extendi Facias, because the Extent is only a Seizure into the King's Hands, and there must be another Award of the Court, viz. a Liberate to deliver over to the Plaintiff; and held for that Reason, that Administratoꝝ de Bonis non should not have the Liberate; for there was something further to be done by the Court in that which was not done in the Administratoꝝ's Life-time, but here nothing is to be done: And Venditioni exponas is not of Necessity, nor does it give to the Sheriff Authority to sell, but serves only to quicken the Sheriff to do his Duty.

Object.

Object. What shall become of the Money? For he is commanded to have the Money in Court, and yet here is none to receive it: True, the Money must be brought into Court, and remain there as Money recover'd by the dead Person, and to be delivered out to such as the Court shall be appris'd to be intitled to it.

The Money must be brought into Court.

Holt, Ch. Just. acc', 1. After Seizure of Goods, there is nothing more to be done by the Sheriff to the Plaintiff, though he could sell the Goods, and deliver the Money to the Plaintiff, and that would be well; yet the Words of the Writ are so, that he levy Money, and bring it into Court; and that may be done notwithstanding the Plaintiff's Death; therefore he having nothing further to do with the Plaintiff, but to execute the Writ, he may, notwithstanding his Death, do it.

C. J. accord. and Sheriff out of Office may be compelled, &c.
1 Salk. 323.
5 Mod. 377.
3 Keb. 397.
Vide ante 291, 292.

In the next Place, it is true, after he has seiz'd Goods to the Value of the Debt, though he be out of Office, yet he is bound to make Sale of the Goods, and to make a Return; and when he has made a Return of a Seizure of the Goods, and that they remain in his hands for Want of Buyers; that is not a Discharge of the Command of the Writ, but only an Excuse that he has not the Money, and he is compellable by Law to bring it in: And though a Venditioni exponas does lie, yet a Distringas is the proper Remedy. And there are two Sorts of Distringas nuper Vicecom', Vid. 34 H. 6. 36. before mentioned; for Distringas to new Sheriff to distrain the old One to sell the Goods, and bring the Money into Court; the other to distrain him to sell, & denar' inde provenientes to deliver to the new Sheriff to bring into Court: Now if a Distringas does lie for the new Sheriff to compel the old Sheriff to sell, that shews the old Sheriff has an Authority to sell by Vertue of the former Writ; Vid. Rast. Entr. 164. Thes. Brev. 90. and the Book called Brevia Judicialia; and that which commands the new Sheriff to distrain the old one to sell, and bring in the Money, is the most usual: Now then since the Sheriff is compellable to sell, having seiz'd the Goods, what should hinder in this Case, that he should not sell notwithstanding the Plaintiff's Death; for the Writ is as forcible and compellable upon them to levy and bring in the Money, as if the Plaintiff had lived; the Sheriff after Seizure is bound to the Value of the Goods: It is not to be supposed that he cannot sell, he is bound to sell at all Events: If the Goods be worth the Money that they are appraised at, and that he returns them of, it is not to be supposed he can want Buyers; and he is not charged to the Value that they shall happen to be sold for, but to that Value that he has return'd; for if he returns Goods to Value, and that they are rescued from him, he shall answer to Value return'd? So here he shall answer for the Value return'd, and not to the Value that they were sold for.

That the proper Remedy is by Distringas, &c.

The most usual is to the new to distrain the old Sheriff.

Sheriff after Seizure is bound to sell to the Value return'd.

And when he seiz'd the Goods by Vertue of the Writ, the Defendant is actually discharged, though they are not sold; for the Plaintiff must depend upon his Execution, and rely upon that; and he has no farther Remedy against the Defendant, but altogether

Defendant actually discharged after Seizure.

1 Vent. 53.
 Caf temp.
 An. 136,
 137.
 Fitz G. 35,
 36.
 Stra. 1063.
 Plaintiff after
 an *Extendi fa'*
 died, and the
 Writ abated.
 Vide 2 Keb.
 257.
 1 Salk. 264,
 322.
 1 Mod. 5, 6.
 Carth. 149,
 200, 246.

Secus upon an
Elegit sued
 out.

Plaintiff's
 Right comes
 to the Admi-
 nistrator *de*
Bonis non, and
 he may have
 the Money
 out of Court.

When the
 Sheriff shall
 forfeit Issues,
 &c.

Judgment
 affirmed.

gether against the Sheriff; and the Defendant having lost his Goods upon an Execution, which the Plaintiff himself has chose, the Goods are in Custody of Law, and the Defendant discharged, 3 Cro. 390. 1 Cro. 459. and the same in 1 Jo. not like this: Plaintiff after a Writ of *Extendi Facias* dies, the Sheriff takes an Inquisition of the Seizure into the King's Hand, and then Administrator *de Bonis non* comes into Chancery, and prays a Liberate: This came in question upon an *Ejectment* brought by Administrator *de Bonis non*, and held, That the Extent was void; for the Writ was abated, and no matter whether the Plaintiff died before the Return or Seizure, or after; because no Property is vested in him by the Seizure, but that only is in order to gain a Property by a Liberate; and there could be no Liberate to him that sued the Writ, because he is dead; and no more Reason for Administrator *de Bonis non* to have it, than if Executor had sued *Sci' fa'* to have Execution of a Judgment, and before the Return of the Writ, died, and Administrator *de Bonis non* should come for Execution, which he could not have: But in this Case, there is no Necessity for the Plaintiff in the original Action to come to the Sheriff for Execution; but in case there be no Act of the Court to be done, but an *Elegit* sued out, which commands the Sheriff to deliver the Lands extended to the Party; if there the Executor or Administrator died after the Inquisition, and before the Delivery, in that Case the Death of the Plaintiff shall not avoid the Execution, and that appears by 1 Sid. 29. though not so very plain.

So the Sheriff seiz'd the Goods in the Plaintiff's Right as Administrator, and by Vertue thereof becomes responsible to him as Administrator for the Value which he himself has returned; and that Right which he had now, comes to the Administrator *de Bonis non*; and therefore when the Execution is compleatly executed, and the Money brought into Court, Administrator *de Bonis non* may produce his Administration, and the Court will thereupon let him take the Money out of the Court; and that is not by way of Judgment.

The Sheriff by the Writ is to take Goods, and sell them in convenient Time: Indeed the not selling is not such a Fault for which he may be amerced; out if a *Distringas* upon his Return go against him to the Coroners, if he continue Sheriff, and he don't sell between the Teste and Return of the *Distringas*, he shall forfeit Issues: And after Goods once seiz'd, no Writ of Error, or Superseas, shall stay the Sale.

Et sic Jud' affirmatur per tot' Cur'.

Of Administrators *de Bonis non*, see Skinner 143, 232. ante 297. 2 Brownl. 132. Hob. 246. Latch 140. Palm. 443. Styl. 225. 2 Vent. 362. 1 Chan. Rep. 224. 1 Vern. 473. 2 Vern. 249.

Cragger *versus* Glover.

ONE who had been in Prison the 8th of November before for a Debt under 100 l. and after, in Pursuance of the late Act of Parliament, upon Summons to the Creditor, at whose Suit he was in, is discharged by the Justices of Peace, and after is arrested for a Sum above 800 l. And the Doubt was upon the Construction of the Statute, Whether he should be held to special Bail, or discharged upon common Bail? And upon a Conference of all the other Judges, it was resolved he should be held to special Bail.

The Doubt arose upon the Words [any Debt]. But then the Proviso is, That no Person shall be discharged out of Prison by Vertue of this Act who shall stand charged and indebted in above 100 l. to any Person. Now some would have this applied to the first Discharge, that is, the Discharge by the Justices of Peace. But why not rather to the 2d Discharge, or equally to both Discharges? For he that is discharged upon an Appearance is discharged, and by this Act, Power is given to discharge them, if they be taken again; and then the Proviso is, That he shall not be discharged if the Debt be above 100 l. So no Man is to be discharged by Vertue of this Act, that is charged with a Debt of above 100 l. at the Suit of one Person.

And he that is now arrested at the Suit of one Person, is charged for Debt above 100 l. therefore shall not be discharged by Vertue of the Act.

And as to the Discharge upon common Bail by Vertue of the Act, the Judges may do it as well as the Justices of Peace.

Vide ante 22.
2 Salk. 521.
S. C. Ld.
Raym. 1088.
Cas. temp.
An. 36.
A Prisoner
for Debt un-
der 100 l.
was dischar-
ged pursuant
to the late
Act, and af-
terwards was
taken again
for above
100 l.
He must find
special Bail.
Vide 1 Salk.
345.
Cas. temp.
W. 3. 513.
Cas. temp.
An. 2.
Ld. Raym.
383, 3, 4.
1196, 1264.
1 Barnes 82.
Stra. 1233.

The Judges
Authority.

Domina Regina *versus* Macarty & al'.

INDICTMENT was against them for an Imposition put upon the Prosecutor, and cheating him in a Parcel of pretended Port Wine. Upon Evidence the Fact was, That one of the Defendants pretending himself to be a Broker, and the other a Portuguese Wine-Merchant, did come to the Prosecutor being a Hat-ter, and would bargain with him for a Parcel of Hats, and proffer him a Parcel of Portuguese Wine in Exchange, and upon this prevailed with him to come and taste of the said Wine, which in Truth was but Stale Beer mix'd with Vinegar, which notwithstanding the Defendants affirm'd to be Portuguese Wine; and hereupon a Bargain was struck, and Hats to the Value of 118 l. delivered for so many Pipes of the said pretended Wine. And here the Prosecutor was the only Witness, and he was allowed for good Evidence by Holt, Ch. J. because it was a Cheat put upon his Person; and he compared it to Paris's Case in 1 Sid. where if the Recognizance had been forged, the Party himself could not be a Witness, but may for a Cheat put upon himself.

1 Salk. 286.
S. C.
S. C. Ld.
Raym. 1179.
Indictment
for cheating
Prosecutor in
a Parcel of
pretended
Port Wine.
Ante 42, 61,
105, 147.
Post 311.
Stra. 7, 8,
497, 849.
866, 904.
999, 1246.
1 Sid. 431.
2 Keb. 572.
Hard. 331.
1 Vent. 49.
78.

Several Exceptions were taken to the Indictment :

Exceptions
to the Indict-
ment of *Vini*
prætens.

Vid. 1 Lutw.
465, 466.

1. That it was laid that he sold several Hogsheds *Vini prætenfi*, whereas it was all other *Liquor*; when it should be so many Hogsheads of such *Liquor* for *Wine*, or pretending it to be *Wine*.

2. That it is laid *Super se assumpsit esse a Merchant of London*, *atli esset*, instead of *acsi esset*.

3. It is laid, *Magnam Quantitat' Vini*, without shewing what Quantity, or of what Price; for which, Vide 2 Lev. 38. that the very Sum taken in Usury ought to be set down, and that it is not enough to say that he took above the lawful Use.

4th Exception. Not laid that the Defendants knew it not to be real *Wine*. Vid. 9 H. 6. 9. Cro. Car. 283. Trin. 11 W. 3. K. *versus* Foster.

Per C. J.
Here is a false
Token and
Combination.
Ante 42, 61,
105.

Cal. temp. An. 222. Ld. Raym. 865, 890, 1013.

Holt, Ch. J. The Crime is not the selling one Thing for another, but here is a False Token, the one pretending to be a Broker, and the other a Merchant, and a Combination to cheat; but the Exceptions seem weighty; Et adjourn'.

And being moved again in Hillary Term, it was held, That *super se assumpsit esse Mercatorem* was well enough, and the *Atli esset* only Surplusage.

But Holt, Ch. J. thought the first Exception fatal, for *Vinum prætenfum* may be *verum Vinum*, and *pratenfum* is not the contrary of *verum*, but *falsum*. And where Powell thought *pratenfum* and *falsum* to be the same, and quoted the Statute of Maintenance of pretens'd Titles to prove his Opinion, Holt, Ch. J. said, in that very Case the Title of the Disseisee, which without Doubt is the true one, is called *pratenfus Titulus*, which shews *pratenfus* and *verus* not to be contrary.

Et adjournat'. Et adjournat'.

S. C. Ld.
Raym. 1060.

Scrimshaw *versus* Westby.

Error of
Judgment for
Plaintiff upon
a Promise to
buy, &c. as
many Prunes
as Plaintiff
could,

Error of a Judgment in the Common Pleas, where it was declared, That in Consideration that the Plaintiff, at the Instance of the Defendant, would buy for the Defendant tanta Pruna quant' in ea Parte posset, and bring them to Billingsgate Wharf in London, he the Defendant agreed to pay him 8 Shillings a Bushel for blue Prunes, and 6 for Damsons; that hereupon he bought such and such Quantities of each, and brought them to the Place ready to be delivered to the Defendant, and tendered them, and that Defendant did not receive them. Jud. pro Quer. in Common Pleas. And the Error assigned was, That it was not averr'd that this was all he had, or could have bought.

But per Cur. That need not have been said, for Fruit are *Bona peritura*, and to be sold immediately; and it was never the Intent

of the Agreement he should stay the Delivery until he could have got together all he could have bought. Besides, if this was not all he had bought or might have bought, that might be insisted on at the Trial as he had bought any for others.

And upon Non assumpsit the Plaintiff must have proved his Declaration; and Judgment affirmed, especially it being after Verdict. Judgment affirm'd.

Villars versus Cary.

1 Salk. 3.

ERROr of Judgment in the Palace Court of Westminster. The Plaintiff did declare, that the now Plaintiff did become indebted to him by Bond in the Sum of 107l. per Nomen J. V. Vicecom' Purbeck & Domini Buckinghamiæ. Defendant, without craving Oyer, pleads that he was truly indebted to the Plaintiff in 92l. 5s. 9d. and that by Way of corrupt Agreement for the forbearance of that Sum for a Year, this Bond was given, &c. Plaintiff replies, That it was pro vero & justo Debito, and traverses the corrupt Agreement. To which Defendant demurred specially, for the Replication did not shew how much the just Debt was. Sed non allocatur. For there is enough to induce the Traverse, and if it had been alledged, you could not have travers'd the Inducement; and the Declaration sufficiently shews the Debt. Error upon a Judgment in the Palace Court, &c. Vide ante 223.
Vide 1 Cro. 609. Jo. 627.

And if there be a just Debt due, and a Bond is given for the Payment of it with unlawful Interest, it is Usury.

Then it was objected, That the Declaration was nought to say, that the Defendant became bound per Nomen & Cognomen J. V. Vicecom' P. & D'ni B. the Vicecom' P. & D'ni B. being Titles, and no Names, nor can they be understood to be his Surname, for then they ought not to be put in Latin: And if one will become bound in such Manner, the Way to declare is by an [Alias dict.] Quod Cur. said to be the best Way. Vide 2 Salk. 451.

But as to the Objection in the Declaration, if you would take Advantage of it, you should have craved Oyer. 2 Salk. 658. Vide ante 233.

3d Objection was, That he declared ad Damnum of 200l. and concludes, Unde petit Judicium & Damna sua præd. when it should be Damna Occasione Detentionis Debiti sui; and we are upon special Demurrer.

But per Cur. It is no Fault of Form.

And let the Debt be contracted where it will, and Bond given for it within the Jurisdiction of an Inferior Court, that gives them Jurisdiction.

And Judicium affirm'.

Judgment affirm'd.

Slater

1 Salk. 42.

S. C.

S. C. Ld.

Raym. 1071.

Debt by Ad-

ministratoz

*durante Ab-**sentia* of A.

the Executor.

Lutw. 342.

Fitz-G. 202,

257, &c.

Ld. Raym.

338, 667, 685, 265, 409, 824, 1072, 1216.

Slater *versus* May.

DEBT by Administratoz *durante Absentia* of A. who is an Executor, shewing, That Administration was committed to him *debita legis forma*, without shewing that at the Time of Administration committed he was absent beyond Sea, or that the Absence continued. Executors *durante minoritat.* 1 Mod. 62, 174. 2 Saund. 148. 2 Lev. 37. Cro. Car. 240. God. 104. Yelv. 130. 5 Co. 29. 5 Mod. 395. Comberb. 475.

And Per Cur'. It is reasonable the Ordinary should have Power to commit Administration during Absentia of an Executor beyond Sea, and such Administratoz to be accountable to the Executor; and when they say, that it is *debita Legis forma durante Absentia*, we must understand it an Absence beyond the Sea. Vide 1 Lutw. 342. Clare *versus* Hodges. But the same in 4 Mod. 14. is not Law, nor agreeable to the Roll. But sure it ought to be averred that the Absence continues, according to Pigot's Case, 5 Co. and so in case of Administratoz *pendente Lite.* Vide 3 Keb. 212. and so in all like Cases.

Jud. pro Def. And *Judicium pro Def.*

Vide 2 Salk.

599, 600,

602.

S. C. Ld.

Raym. 1096.

Sci. fa. against

Bail, who

plead no *Capias*

sued

within the

Year, &c.

Ante 256.

Hob. 195.

Aley 12.

2 Lev. 19.

1 Saund. 299.

Eq. 31, 340.

Cholmley *versus* Veal.

SCI. Fa. against the Bail, who plead no *Capias* against the Principal. In Replication a *Capias* is set forth, and Non est invent' return'd upon it, which appeared to be tested a Year after the Judgment.

And Per Pengelly. To charge the Bail, there ought to be a *Capias* legally sued out, and this appearing to have been sued out after the Year, and no *Sci. fa.* appearing, must be looked upon as illegal. Ideo, &c. Vide Lutwyche's Rep. 1283. Redman *versus* Idle, &c. and 3 Keb. 671.

Ld. Raym. 156, 157. Cas. temp. Mac. 267, &c. 269, 303, &c. 306. 1 Mod. Cas. in L. & Stra. 822, 1139.

Holt, Ch. J. The Plaintiff intitles himself to recover against the Bail upon Breach of the Recognizance, which is, that he should answer the Condemnation, or render the Principal at the proper Time. And the Breach is assigned, and a *Capias* set forth to have been taken out and returned, and what need he take Notice of a *Sci. fa.* for the Bail are Strangers to the Record, and cannot take Advantage of Error in it. So the not being of a *Sci. fa.* previous to the *Capias* taken out after the Year is but Error at the best, of which Bail cannot take Advantage. So if it had actually appeared to us that there was no *Sci. fa.* I question whether it be any Thing more than Error, and so not available to the Bail; but if it were actually void, still it ought to come of the Bail's Side. And the Plaintiff in intitling himself against Bail never mentions any Thing of the *Capias*. And you come and admit all that intitles him to his *Sci. fa.* against you, viz. the Non-payment of the Condemnation, and Non-rendering the Principal,

Jo. 239.

cipal; but say, that there was no Capias, which is to say; that his Time to render was not yet come: And what has the Plaintiff to do but to shew that there was a Capias, and the Capias which they shew may be irregular? And if it may be so, we shall not intend it ill till you shew it so: And there is full Title made for the Plaintiff, and your Plea is only an Excuse that there was no Capias; and the Reason of it is, that I am not bound to render the Principal till I know what Execution the Plaintiff will chuse; whether he will chuse to have his Body, which he makes appear by suing a Capias; for he might have sued an Elegit, or Fi' fa'. Vide antea 257.
1 Jo. 139.
Caf. temp.
W. 3. 601,
602.

Jud' pro Quer' per totam Cur. If the Defendant dies after Capias, and before Return of it, Bail is Discharged; per Jones, 1 Jo. 136.

Thornborough *versus* Whitacre.

Assumpsit, That in Consideration of Half a Crown by the Plaintiff in Hand paid to the Defendant, he promised to pay two Grains of Rye upon Monday the 29th of March in such a Year, four Grains the next Monday after, and so on by progressional Arithmetick every Monday for a Year; and Non assumpsit pleaded. S. C. Ld.
Raym. 1164.
Assumpsit upon Defendant's inconsiderately promising to pay 2 Grains of Rye per Week, &c.
1 Jo. 138.
1 Vent. 267.
Vide 1 Keb. 569.
1 Lev. 111.
Matheson Walliss, ff. 1. cap. 31.
Vide 2 Salk. 543, 544.
S. C. Ld.
Raym. 1164.
Two Ways of Pleading Privilege of a Court.
Ante 26, 106, 114.
&c.

Per Cur', upon Motion: Let them go to Trial; and though this would amount to a vast Quantity, yet the Jury will consider of the Folly of the Defendant, and give but reasonable Damages against him.

Phips *versus* Jackson.

It was pleaded in Abatement, That tempore quo memoria non extat, all the Clerks of the Queen's Court of Exchequer were privileged from being sued elsewhere than in that Court; and that the Defendant was Clerk to R. P. un' Baron' de Scaccario nostro præd'. And upon Demurrer; Per Cur', There are two Ways of Pleading of a Privilege. 1 Vern. 246. Stra. 864, 837, 76, 191, 546.

One is to go to Issue, and at the Trial if the Party be an Officer of Record, to shew it by producing the Record; if he be not an Officer of Record, but is Attendant to one of the Barons, that must of Necessity be tried by a Jury, because the Court of Exchequer, as a Court, cannot take Notice of it no more than we. 1. To go to Issue.
1 Jo. 289.
1 Vent. 264.

The other Way is, if he be an Officer on Record, to produce a Writ of Privilege at the Time of the Plea pleaded, and then no Issue can be joined upon it: And here the Custom is ill pleaded, for tempore quo non extat memoria is Nonsense, and should be *cujus contrarii memoria non*, &c. 2. By producing his Writ at the Time of the Plea.
Vide 1 Inst. 115. b.

But he having shewed, that he is one of the Clerks of a Baron, and insisting upon Privilege; ought not we to take Notice that he ought to have Privilege?

1 Barnes 266.
Plea here ill
for Want of
Averment,
&c.

Ante 105.

Vide 3 Mod. 216. 2 Lev. 50, 88. Vide ante 3, 223. Ld. Raym. 13, 14, 532, 337, 635, 673, 704, 869, 898, 1173, 1208, 1524, 1556.

To which it was answer'd, That he did not aver that he was Clerk to one of the Barons of the Queen's Chequer, but de Scaccario n'ro: And for that, a Respond' Ouster was awarded. Of Averments, see Carthew 300, 412. Skinner 17, 569, 570, &c.

Michell *versus* Waldron.

Error upon
Award of a
Writ of In-
quiry in C. B.
Caf. temp.
W. 3. 22.
Ld. Raym.
1135.

1 Mod. Caf.
in L. & Eq.
304.

Comyns 580.

1 Barnes 347.
Amended

here, and the

WRIT of Error of a Judgment in Common Pleas, and Error assigned was, That the Award of the Writ of Inquiry was, Ideo Præceptum est Vic' London quod Inquirat, in the singular Number, and so all along in the singular Number: And the Question was made, Whether this be amendable in this Court, so as to save the Defendant the Costs which he must pay upon an Amendment in the Common Pleas? And 3 Cro. 677, 709, 185, were quoted for such Amendments here, 2 Vent. 171. was allowed per Cur'. But they seemed to incline they could not amend, this being the Award of the Court, but would consider.

Roll ordered to be brought in, &c.

Vide ante
270, 272,
&c.

And in Hillary Term the Court said, It was only a Mistake of the Clerk; for the Courts of Westminster do take Notice, that there are two Sheriffs in London; but because the Court cannot amend without having something to amend by, Ch. Just. ordered the Officer of Com' Banc' to attend with the Roll in order to an Amendment.

Woodcock *versus* Morgan.

Nar' in Debt
upon Bond,
with Omis-
sion of *quas ei*
debet, &c. and
ill.

Ld. Raym. 336, 703, 1043.

DEBT upon a Bond, shewing, That such a Day the Defendant became indebted to the Plaintiff per Scriptum suum Obligatorium, without shewing the Date of the Bond, or saying, that it was sealed and deliver'd.

1 Lev. 130,
224.
1 Sid. 342.

But per Cur', Becoming indebted per Scriptum Obligatorium, is enough; but the Plaintiff being W. queritur de Mo. &c. de placito quod reddat ei, without saying quas ei debet & injuste detinet, it was held ill.

Domina Regina *versus* Buck & Hale.

1 Salk. 380.
Two Collec-
tors and As-
sessors of pub-
lick Taxes
indicted, &c.
for their In-
justice, &c.
Caf. temp.
An. 79, &c.
53, 54, 137.

THEY were found guilty upon an Indictment for a Misdemeanor; For that being Collectors and Assessors of the publick Taxes in such a Parish, they assessed and rated some at too high a Rate, and omitted to tax some others in their Books, and yet levied the Taxes upon them, and put the Money in their own Pockets. And now coming to receive Judgment, it was urged by Mountague, That it being no Offence of an infamous Nature, as Perjury or Forgery, nor against the Publick, there ought not to be any corporal Punishment, as Pillory.

But per Cur', It is an Offence of dangerous Consequence, and very pernicious to the Government, and of very ill Example, too much praîsed of late; for what greater Discouragement can there be to the People to pay their Taxes freely, than to have Injustice and Inequality of Rates for the private Advantage of some? And therefore this Offence deserves an exemplary Punishment; and they were adjudged to the Pillory in the County where the Fact was committed: And ordered the Marshal to carry them down, and that a Writ should go to the Sheriff of the County to assist him in the Execution.

Vide ante 234.
1 Cro. 332.
Cro. Jac. 65.
Noy 102.
Mo. 781.
3 Inst. 145.
1 Leon. 295.

Domina Regina versus Inhabitantes de Com' Wilts.

1 Salk. 359.
S. C.

UPON Debate on Motion for a new Trial, where the Issue was, Whether the County of Wilts at large, or the Town of L. within the County, were obliged to repair the Bridge of L. in that County; an Order of Sessions formerly made upon the Inhabitants of L. to repair, being offered in Evidence for the County at the former Trial, and rejected upon this Reason, That the Justices of Peace have no Jurisdiction over Highways but upon a Presentment, and none had been to warrant this Order: It was declared by the Court;

Ante 191.
Motion for a new Trial concerning the Repairing of a Bridge, &c.
Cas. temp. W. 3. 13.
198, 409.
Ld. Raym. 725, 792, 804, 856, 1175, 1249, 1169, 1170, 858.

1. That it is a good Cause to grant a new Trial, that the Judge who tried the Cause over-ruled good, or admitted that which was no Evidence, and that though the other Party has a Remedy by Bill of Exception.

What is a good Cause for new Trial.
Vide ante 18, 22.
Ld. Raym.

62, 63, 148, 1359. 1 Wms. 212. Comyns 601. Stra. 642, 643, 1105, 1142.

2. That the Inhabitants of the whole County cannot of their own Authority change the Bridge or Highway from one Place to another; for it cannot be without Act of Parliament.

Inhabitants cannot change a Bridge, &c.
1 Salk. 12.

3. The County of common Right are bound to repair publick Bridges; but a particular Person, Town, &c. may for a special Cause be bound to repair them, as by Tenure, Prescription, &c.

Vaugh. 341.
Cro. Car. 266, 267.

4. If a private Person build a private Bridge, which after becomes of publick Convenience, the whole County is bound to repair it: Vide 2 Inst. 701.

When the County is bound to repair.

5. This Matter concerning the whole County, Suggestion may be of any other County's being next adjacent; and the Venue shall come from thence for the Necessity of an indifferent Trial.

1 Salk. 358.
Where a private Bridge becomes a publick Convenience.

6. One of the County is a good Witness in the Case, though not a good Juroꝝ: And at last, a Rule by Consent was made.

Venue. Witness.

And per Holt, Ch. Just. If it be not obeyed, an Attachment may go against the Inhabitants of the whole County, and catch as many as one can of them.

Attachment.

Treil

Treil *versus* Edwards.

Executor,
when estopp'd
in his Evi-
dence of
Want of As-
sets.
Vide 1 Jo.
87.
Ld. Raym.
589, 591,
1051, 1054.

PER Cur', If Executor suffer Judgment to go against him by Default upon executing Writ of Inquiry, he shall not give Evidence of Want of Assets, for he is estopp'd, as if it had been the Case of an Heir; for he should have pleaded Plene Administravit, or specially what Assets he has.

A Citation was in the Consistory Court of ——— and a Prohibition was moved for upon three several Points:

Caf. temp. W. 3. 411. Comyns 87.

Grounds on
Suggestion for
a Prohibition
to a Consistory
Court.

Vide 1 Salk.
190, 377.
Farell. 10.
Ld. Raym.
442, 991.

1. That they refused a Copy of the Libel.

2. That the Citation was, Profanatione Coemeterii of such a Church; and that the supposed Profanation was by the Party, as Coroner, in the Duty of his Office in digging a Corps for a View.

3. That the said Church was within such a Peculiar, and consequently not within the Jurisdiction of the Consistory Court, not even by Letters of Request: And for Authority for Prohibitions upon the third Point, were quoted Latch 180. Noy 89.

Per C. J.
'That it con-
tains 2 Mat-
ters for Pro-
hibitions of
different Na-
tures, &c.
Vide 1 Vent.
252.
1 Ro. R.
337.
2 Salk. 553.

Vide 1 Cro.
340.
3 Cro. 102.
1 Salk. 40,
41.
3 Lev. 193.

Prohibition
might be, if
the Suggestion
were right.

Holt, Ch. Just. Your Suggestion contains two Matters that ought not to go together: The one, the Denial of the Copy of the Libel; and the other upon the Merits, for they are Grounds for Prohibitions of different Natures: The first for a Prohibition only quousque, which is ipso Facto discharged by granting a Copy of the Libel without Writ of Consultation: The other, a peremptory Prohibition, which ties them up till a Consultation; and upon such a Suggestion we ought not to grant a Prohibition: Indeed, a Prohibition quousque they give Copy of the Libel, if it be granted before any Libel exhibited, does not bind them from exhibiting a Libel, and after they shall not proceed till they give a Copy of it; and then to have a Prohibition upon the Merits, you must make a new Suggestion. And as to the 3d Point, all Peculiars are not inferior to the Ordinary of the Diocese in which they are; and such as are not, cannot transmit any Cause to the Ordinary, and such transmitting must always be to the immediate Superiour: The Dean and Chapter of Salisbury have a large Peculiar within the Limits of the Diocese; but as much out of the Jurisdiction of the Diocese of S. as the Diocese of London is: The peculiar Jurisdiction of an Archdeacon is not properly a Peculiar, but rather a subordinate Jurisdiction; Vid. Hob. 185, 186. and the Remission of the Cause must be to that Jurisdiction to which the Appeal would lie, in case the Cause had not been remitted: And a Peculiar *prima facie* is to be understood of him that has co-ordinate Jurisdiction with the Bishop: And therefore to determine what Sort of Peculiar this is, would be improper to determine upon Motion; and if your Suggestion were right, it were fit for a Prohibition, and the Matter to come in Debate on a Declaration therein.

Domina Regina *versus* Major' de Hereford.2 Salk. 701.
S. C.

MAndamus to him to swear such a one into the Place of Town-
Clerk of H. and Return was, That upon Election B. had
eighteen Voices, and the Party who sued the Mandamus but se-
venteen, and that they swore in B.

An argumen-
tative Return
upon a Man-
damus, is ill.
Vide 2 Salk.434, 436. Caf. temp. W. 3. 401, 2, 3, 27, 113. Ld. Raym. 1244, 1267, 1304, 1379, 1405. Caf. temp.
Mac. 101, 102, 174, 176.

Per Cur', It is a bad Return, because it is argumentative, when
it should be express and direct, that he was not chose: And the
Case in Sir Thomas Jones was said by Holt, Ch. Just. to be a
strange Case, and contrary to subsequent Resolutions; but if the
Mayor had return'd an Election de Facto, and that the Party had
given a Bribe to get himself chose, it had been something.

Vide 2 Jo.
177, 178.Bernardiston *versus* Vic' Middlesex.

Plaintiff took out a Writ against J. S. and delivered it to the
Defendant to be executed: Upon the Arrest, the Bail-Bond
by the Officer was to appear at the Suit of Bernadistant, and Bail
was put in by that Name, and after a Reddedit se by the same
Name; and the Plaintiff sued the Sheriff for Escape.

Misnomer,
Bail-Bond,
and Reddedit
se, variant
from the first
Writ, refused
Amendment.

And it was moved by Mountague, That the Bail-piece and Red-
dedit se, might be made according to the Writ.

But per Cur', It cannot be; for the Bail must be according to the
Bail-Bond, and not according to the Writ, or the Return of it; and
though it be Vitium Scriptoris in the Bond, yet we cannot help it.

Per Cur', It is a great Abuse in Ejectment, that People make no-
minal Lessees Persons not in rerum natura, or at best not known to
the Defendant; so that he thereby may lose his Costs. And per om-
nes, The Attorney that does so, ought to pay Costs; and in this Case
an Attorney was put to answer Interrogatories for such a Practice.

Abuses in
Ejectment as
to nominate
Lessees.
Vide ante
130, 222.
Carth. 3,
Sira. 402.

204, 277, 288, 391. Caf. temp. W. 3. 318, 445, 656.

Dean *versus* Crane.1 Salk. 28.
S. C.

ANote had been made by the Defendant to the Plaintiff's Testa-
tor above six Years before the Action brought for Payment of
Money; and upon Non Assump' infra sex Annos, at the Trial before
Holt, Ch. Just. the Plaintiff gave Evidence of a Promise made to
himself after the Arrest, and before the Will exhibited; and whether
this Evidence maintained the Declaration was the Question: And
the Case of Heylin and Hastings was remember'd, wherein upon
Conference with all the Judges of England, it was held, That a
Promise

Executor de-
clares of a
Promise to
his Testator,
Limitation,
&c.
Vide ante
25, 240,
Ld. Raym.
389, 422,
741, 838,
1101.
Caf. temp.

4 K

W. 3. 223, 224, 444. Caf. temp. Mac. 314. 2 Wms. 373. 3 Wms. 84, 89, 143, 144. Comyns 54.

Promise after the six Years brings the Matter out of the Statute of Limitations; that owing the Debt does not go so far, but is Evidence of a Promise.

Note; Here the Declaration was of a Promise to the Testator, and the Promise in Evidence was to the Executor.

Held that the Evidence did not maintain the Declaration.

And the Court said, Here the Executor might declare of a Promise to himself: But adjournatur. And in Hillary Term, upon Conference with all the Judges it was held, the Evidence did not maintain the Declaration.

Of filling up a Writ after it is sealed. 1 Mod. Caf. in L. & Eq. 243. v. 3 Wms. 118. 1 Barnes 25, 132, 133.

Per Holt, Ch. Just. It is illegal to fill up a Writ, after it is sealed; and whoever is arrested by Virtue of such a Writ, has an Advantage: But Quare, if it be false Imprisonment, or to be relieved on Motion.

2 Salk. 572. S. C. Ante 228. Mandamus to admit, &c. teaching Dissenter to qualify himself. Ld. Raym. 1206. Stra. 58, 59.

Peat's Case.

KING moved for a Mandamus to the Justices of the Sessions of the County of Warwick, to admit Peat to take the Oath of Allegiance, and to subscribe according to the Act of Toleration, in order to be qualified to teach a Dissenting Congregation; and it was granted.

And per Holt, Ch. Just. The Party ought to suggest whatever is necessary to entitle him to be admitted; and if that be not done, or if it be done, and the Fact be false, that will be good Matter to return.

Vide 1 Salk. 52.

Williams *versus* Hoskins.

Ante 263. Sci' fa' upon a Judgment in Ejectment denied to be amended. See Carth. 70, 76, 367, 570. Caf. temp. An. 263. Ante 263, 284, 286.

Judgment in Ejectment was for two Messuages, and after a Year a Sci' fac' upon it recited a Judgment of one Messuage only; and to this Nul tiel Record was pleaded; and it was moved to amend it.

But per Cur', It cannot be; for this is a good Writ for any Thing that does appear on the Face of it; and for that, if there were a Judgment for one Messuage, this Writ would be a good Writ to revive: So being good in it self, though not apposite to this Purpose, to amend would be to make a new Writ, or to alter a good Writ, and fit it to another Purpose; and to amend this Writ, would falsify the Defendant's Plea, which was good at the Time when it was pleaded; and for that this ought not to be, the Case of Napiere and Sir John Germaine was quoted, where after Wisnomer pleaded, the Court refused to amend, because it would falsify the Plea: But if the Fault had appear'd in the very Writ, it might be amended; and tandem the Plaintiff for his Expedition took another Writ.

So Plaintiff took out a new Writ.

And Per Cur', That he might do without getting this quash'd; for if this Writ abates, then it is not the same Cause. Vid. antea.

Linch

Linch *versus* Hooke.

SHE was arrested by the Name of Minors, and gave Bail-Bond by that Name, and now would plead Misnomer.

And per Cur', If one be arrested by a wrong Name, and brought into Court, he may plead Misnomer: And if Feme Covert be arrested by a wrong Name, and give Bail-Bond, yet she may plead Misnomer; for her Bond being that of Feme Covert, she may plead Non est Factum to it; ideo it will not estop her. 1 Vent. 13 Cro. El. 198, 249, 583.

1 Salk. 7.
S. C.
Vide ante
225.
A Feme,
after Bail-
Bond given,
may plead
Misnomer,
&c.
Vid. 154,
225.

Domina Regina *versus* Hannon.

HER was indicted, for that being a communis Deceptor of the Queen's People, he came to the Wife of B. and made her believe he had sold Part of a Ship to her Husband, and upon that account got several Sums of Money from her.

Per Cur', Communis Deceptor is too general, and so is communis Oppressor, Perturbator, &c. and so of all other (except Barretor and Scold) without adding of particular Instances; and the particular Instance alledged here, is of a private Nature: If he had made use of any False Token, it would be otherwise.

1 Hawk. 243, 244. 1 Sid. 282. Fitz-G. 56, 57, 58, 59. Ld. Raym. 442, 1013. Stra. 2, 8, 866, 999.

Vide 1 Salk.
379.
Ante 42, 61,
182, 301.
In an Indict-
ment Commu-
nis Decept',
&c. is too
general.
1 Lev. 299.
1 Vent. 97.
104.
1 Mod. 71,
288.
2 Keb. 687.
1 Salk. 382.
Farell. 52.

Et cassetur per Cur'.

Indictment
quashed.

Tenant *versus* Goldwin.

IN Case, the Plaintiff declared, That such a Day and Year he was possessed, and yet is possessed of a Messuage situate in such a Place for a certain Number of Years yet not ended, and also of a Cellar Parcel thereof: Which said Cellar lies, and all the aforesaid Messuage did lie, contiguous to the Messuage of the Defendant in the Parish aforesaid; and from a Vault, Parcel of the Defendant's Messuage, was wont to be separated by a strong thick Wall, which to the Messuage of the Defendant did belong, and by the Defendant for all the Time aforesaid ought to be repaired: But that the Defendant, machinans, &c. though often requested to repair the said Wall, so negligently kept it in Repair, that for Default of Care in him, and repairing of the same, the Filth of the said Vault, by the Decay and Breach of the said Wall, in the said Cellar did flow, and fill the same for such a Time, by which the Plaintiff lost the Use of his Cellar, &c. And the whole Question was, Whether the Declaration was good to entitle the Plaintiff to this Action? Because, as was objected, it was to put a Charge upon the Defendant, which could not be but by Prescription; and none was laid here, nor was it said the Messuage was an

S. C. 1 Salk.
21, 360.
S. C. Ld.
Raym. 1089.
Case, for not
repairing the
Wall of his
Vault, &c.
Vide ante
244, 245.

Vide Show.

64.

3 Lev. 133.

3 Mod. 51,

52, 132,

294.

Pal. 290.

Cro. Car. 499.

an ancient *Helluage* capable of a Prescription: But in Maintenance of the Declaration, and that it was well, being for a Tort to his Possession, was quoted 1 Cro. 575. 3 Lev. 266. it was for stopping a Way which the Plaintiff habere frui & uti debuit over the Defendant's Meadow, without making any Title to the Way, but merely upon the Possession; and held it would be good upon Demurrer.

A Difference between charging a Wrong doer, and the Tenant of the Land.

Ld. Raym.

266.

Caf. temp.

An. 3, 179,

220, 221.

Comyns 7.

And per quosdam, Upon a special Demurrer; and is so much the stronger, for that it was a Charge against common Right; and there is Difference between charging a Wrong-doer, and the Tenant of the Land in which one would lay the Charge; besides, the Law has Respect to the Nature of the Charge, as whether it arises by the Act of the Party, or by Act in Law: As in *Assize* for a Rent-charge against the Tenant of the Land, the Plaintiff must shew his Title; otherwise it is in Case of *Assize* for Rent-Service; and the Reason of the Difference is, because one is of common Right, and the other not. 35 H. 6. 7. 27 H. 6. 15. a. So in *Assize* of Common in Grass, there must be a Title made to the Plaintiff; secus it is of Common appendant, because it is by Act in Law; and though it may be by Prescription, yet that is but subsequent Evidence, and not the Cause and Foundation of it.

For not Repairing the Highways. Carth. 212, 451.

If the Hundred be indicted for not keeping the Highway in Repair, it need not be said how it is chargeable; but if it were against a particular Person, it is otherwise: So here, if this Action were for not Repairing another Man's House, or such a Highway, there would be Reason that the Plaintiff must shew a Title, and a special Reason of the Charge, because it would be to impose a Charge upon him against common Right: But here it is to repair his own House, which of common Right he is bound to do; and every Body by Law is so far bound to repair his House, that through want thereof another be not prejudiced.

Writ de Domo reparanda, &c.

Waste by Lessee.

Tenants of Rooms.

Solebat reparari.

Vide ante 20.

At Common Law, if there be two Jointenants of a House, and it wants Repairs, a Writ De Reparatione faciendâ will lie for the one against the other; so if the House of one be likely to fall to the Prejudice of another Man's House, a Writ De Domo reparanda will lie, and it is no Matter whether it be an ancient House, or a new one: But if the one were an old ruinous House, and a new House be built near, it will not lie; because the Word Debet in the Writ would exclude him, and the Word Solet in the Writ may be left out: Reg. 153. b. 2 Inst. 404. Moore 374. 11 Co. 82. Westm. 2. c. 24. If Lessee for Years build a House, it is Waste; and to let it fall is a new Waste; Keilw. 98. Held on Debate, that if one Man has the upper Rooms of a House, and another has the Foundation and lower Rooms, and the upper Rooms be out of Repair, the Owner of the lower Rooms has an Action against him that has the upper Rooms; and so it shall be vice versa, for Non-repair of the Foundation: And we say, the Word Solebat reparari, which Word is as strong as Consuevit, and takes away all Intendment or Doubt that it was a new House: So is the Case in 3 Mod.----- and the Case of Roswell and Pryor was after Verdict, and would otherwise have been ill. Vid. 6 Ed. 4. Fitz. Tresp. 110. One

One was cutting down his Hedge, and it fell upon the Plaintiff's Ground; it is no Good Plea to say, that it fell against his Will; but the Defendant ought to shew that he did what he could to hinder it, and that he removed it with all Speed.

Against this were quoted the Cases of *St. John v. Moody*, 1 Vent. 274. *If Assize be for Rent against Certenant, the Plaintiff is compellable to make a Title; otherwise if it be brought against the Person of the Rent: If one nail Boards to my Window, I need not in an Action for the same shew my Title; but if a Man, who has Ground close to my House, in asserting his Right, build in my Light, there I must shew my Right, to have an Action against him for it; upon which Reason is Cro. Jac. 43. Dert. v. Oliver's Case, for hindering the Plaintiff from taking Coll in his Fair, without shewing any Title to it; good because against a Wrong-doer.*

Obj. That Plaintiff ought to shew his Right, &c. Ante 116. Vide 2 Lev. 148. 3 Keb. 528, 531. 1 Vent. 214, 319. 2 Vent. 138, 185, 288, 25. 1 Mod. 292. Cas. temp. W. 3. 215, 509. Ld. Raym. 713. Cas. temp. An. 7, 8. Cas. temp. Mac. 25. 1 Mod. Cas. in L. & Eq. 272, 275. Stra. 634.

Holt, Ch. Just. The Case of Sands and Trefusis is not like this; for there the Solebat goes to the Currere, which is the Thing complained of; and Solebat is of an incertain Signification, and properly goes to repeated Acts; and it is said the Wall Solebat reparari, and yet it is a permanent Thing, and therefore it is very improper to say a permanent Thing Solebat. And he allowed, that formerly and still there is a Difference between charging a Wrong-doer, and the Tenant of the Land; for to charge a Certenant, one must make Title by Grant or Prescription, but none need be made against a Wrong-doer: And formerly it was thought necessary to maintain Case against Certenant for stopping a Way, to shew Title; but the contrary has been holden since; Vid. Brit and Stroud,----and that as well on Demurrer, as after Verdict; but I know no Case where one puts a Charge upon another, except it be of common Right, but he ought to shew Title, as in case of repairing one's House: But if I have a House of Office in my Ground walled, and no Cellar is contiguous to it, and another digs a Cellar close to my Wall, which stands well till you have dug your Cellar, it seems hard to bring a greater Charge upon me, by his digging his Cellar contiguous to my Wall, whereby my Wall is in its Nature become weaker: Suppose one Man has a House, and Cellar contiguous to it, and one Wall serves for both, and he sells the Cellar; Who shall repair the Wall? Or suppose this Cellar was made after the Vault, and the Wall thereof; for the one Party's making a Wall, shall not take away the Owner of the contiguous Soil's Liberty of digging a Cellar; but such digging ought not to bring a greater Charge upon the other.

Vide 2 Show. 243. 2 Cro. 43. 123. 3 Cro. 325, 499, 575. 2 Vent. 186, 187, 350. Per C. J. Solebat is of an incertain Signification, and here improper. 4 Mod. 418. Vide ante 19. Cases put.

Gould Just. Most certain there are a great many Cases, that if a Man declares that he ought to have Common, &c. if it be against the Certenant, or Owner of the Soil, there ought to be a Title made, 1 Vent. 319, 356. but latter Cases have gone otherwise; Vid. Matthew's and Baker's Case, and Plotney and Slaughter, Hill. 4 W. & M. Roll. 1771. And here it is said, he ought to repair; and that Word, ought, will bring the Matter in Evidence, and the Difference is between a Declaration, and a Plea in Bar. 2 Vent. 185. And

Per Gould Just. as to making it a Title. That the Word [ought] will bring the Matter in Evidence.

Per Cur', Declaration good, but not upon the Word Solebat.

Vide 1 Salk. 22, 360. Cases between Buyer and Vendor of Houses, &c. Ante 245.

When Vendee must defend his Cellar.

1 Lev. 122, 239, 248.
2 Lev. 194.
1 Mod. 55.
2 Sal. 459.
Carth. 454, 455.
Poph. 170.
1 Sid. 167.
Raym. 87.
Hob. 131.
Ante 116.
Hutt. 136.
1 Bull. 116.
2 Keb. 825.
1 Cro. 419.
Where Vendor reserves not the Benefit of Lights, &c.
Carthew 454, 455.
Plaintiff might have declared better.

And at another Day, per tot' Cur', The Declaration is good; for there is a sufficient Cause of Action appearing in it, but not upon the Word Solebat; but if the Defendant has a House of Office inclosed with a Wall which is his, he is of common Right bound to use it so as not to annoy another; and there is a great Diversity between a Prescription to put a Charge upon a Man to repair his Fence, and to excuse one from a Trespass, for such Charge must be by Prescription. But the Reason here is, that one must use his own so as thereby not to hurt another; and as of common Right one is bound to keep his Cattle from trespassing on his Neighbour, so he is bound to use any Thing that is his, so as not to hurt another by such User. If a Man has two Houses, one of which has a House of Office that is kept in by the Wall of the same House from a Cellar in the other, and he sells the House to which the House of Office does belong, the Buyer is to keep it in good Repair, so as not to prejudice the Vendor's House; for he is so to use it as not to hurt another.

Suppose one sells a Piece of Pasture lying open to another Piece of Pasture, which the Vendor has; Vendee is bound to keep his Cattle from running into the Vendor's Piece; so of Dung, or any Thing else.

If a Man erects a House of Office, to which there is contiguous a vacant Piece of Ground which is his, and by which the House of Office is kept in; there if he sells the vacant Ground, and Vendee digs a Cellar in it, as he may do, there he must defend his Cellar against the House of Office.

If a Man builds next to a vacant Piece of Ground of his own, and then sells the new House, keeping the Ground in his own Hands, he cannot build upon the waste Ground so as to stop the Lights of the House; for by Sale of the House, all the Lights and all Necessaries to make them useful, pass; for by Sale of the House, all the Convenience it has will pass; and as he himself cannot build to the Prejudice of the new House so sold, so cannot the Vendee of the vacant Ground do it: But if in that Case he had sold the vacant Ground, without reserving the Benefit of the Lights, the Court doubted in that Case that Vendee might build so as to stop the Lights of the Vendor, because he parted with the Ground without reserving the Benefit of the Lights; for that Case differs from that of Palmer and Flechier: And they said they doubted in the Case in Keilw. 98. where it is held, that the Owner of the lower Rooms in a House is bound to repair the Foundation: There is indeed a Writ in Nat. Brevium 127. to a Mayor, to command him that has the lower Rooms to repair the Foundation, and him that has a Garret to repair the Roof; but that is grounded upon a Custom: And the Declaration would be better to say only, That the Wall, and House of Office, are the Defendant's; and that through Default of him, the Filth ran into your Cellar.

Sed Judic' pro Quer'.

Et Jud' pro' Quer' per totam & plen' Cur'.



F I N I S.

A T A B L E

O F T H E Principal Matters.

A.	Account.
Abatement. <i>Abatement</i> by Death Page 300 Time to plead in <i>Abatement</i> 175 Writ <i>abated ex Officio</i> 198 Two Sorts of Pleas to <i>abate</i> the Writ 27 Plea in <i>Abatement</i> to the Addition of Gentleman 80 Demurr' to an <i>Abatement</i> for Want of Additions in an <i>Homine Replegiando</i> 84 In <i>Abatement</i>, that he received Order of Knighthood, good 105 <i>Abatement</i> for <i>Misnomer</i>, with a Traverse, Repleader, and Demurrer 115 Demurrer in <i>Abatement</i>, Joinder in Bar 198 Pleading in <i>Abatement</i> for Want of distinguishing Father from Son <i>Ibid.</i> Plea in <i>Abatement</i> to a <i>Scire fa'</i>, that <i>J. S.</i> was a Tenant not summoned 199 <i>Accessory</i> and Principal <i>Vide</i> 32 <i>Acetiams</i> <i>Vide</i> 266 Acceptance. Feoffment and <i>Acceptance</i> pleaded in Satisfaction of a Bond 82	Indictment for tearing an <i>Account</i> after it was settled Page 175 Actions on the Case. Vid. Case. Locality of <i>Actions.</i> <i>Vid. London</i> Of laying <i>Actions</i> for Money won 129 <i>Object.</i> That such an <i>Action</i> was never brought before, therefore lies not, answered 56 Addition. Servant to <i>J. S.</i> is a good <i>Addition</i> 58 No <i>Addition</i> needful to a Writ <i>Vicon-tiel</i> 85 Administration. <i>Administration</i> by the Archdeacon of <i>D.</i> cannot intitle the Plaintiff upon a Judgment obtained at <i>Westminster</i> 134 If <i>Administrator</i> doth not appear in the Declaration, it is fatal on Demurrer 135 Of one's only generally admitting himself <i>Administrator</i> 136 Plaintiff as <i>Administrator</i> sues the Defendant as Executor, the Intestate dying

The TABLE.

ing before the Return of the Writ of Inquiry upon an Interlocutory Judgment Page 142
 Ordinary of *Ireland* may commit *Administration* here in *England* of Goods within his Diocese 145
 Pleading *Administration* by a Peculiar, 134, 241
 The Power of an Administrator *de Bonis non* 294, 297, 298, 300

Admiralty.

If Prohibition lies before Appearance, to stay Process in the *Admiralty in quadam Causa Salvagii* 11
 Whether the Court of *Admiralty* can compel the Payment, where the Master hypothecates the Ship and Goods Ibid.
 Of the Master's compounding for the Ransom of the Ship 12
 Prohibition to the *Admiralty* to a Suit concerning Seamen's Wages on the Statute of *Limitations* 25
 Property bound by Sentence in the *Admiralty* 26
 From what Time Duty to Seamen arises Ibid.
 The *Admiralty* hath Jurisdiction of the Hypothecation of a Ship 12, 25, 79
 Caution given in the *Admiralty* to some Part-owners of a Ship, and there afterwards libelled, the Ship being lost 162
 Ship in Distress pawned by the Master, if Prohibition may be to a Libel 79
 Libel in the *Admiralty* for Seamen's Wages 238

Almanack.

Where the *Almanack* is Part of the Law 41, 81
 Whether the Court can take Notice of the Mistake of a Day, being told it *Ore tenus* 196
 A Calculation moveable for *Easter*, *Ibid.*

Amendment, by Memorandum in a Declaration. Vide 33.

Of Exception in criminal Matters by Stat. 8 H. 6. Page 269
 Where *Amendment* must begin in Repleader 2
 What Errors of a Judgment in an inferior Court, will be allowed to be amended 167
 Difference of *Amendments* of Writs, 284, 286, 263, 279, 310
 What's amendable in Crown-Cases by the Common Law 268, 271, 281
 Of *Amendment* of Indictments, Informations 272, 273
 If criminal Proceedings are amendable per Statutes 276
 If Error in the *Teste* of a Writ be amendable Ibid.
 What cured by the Stat. of *Jeofails* 4, 5
 The Statutes of *Amendments* explained 285, 286

Appeal.

Appeal brought against one acquitted at the Assizes, upon Indictment of Murder: Motion to have the Appellee discharged: *Per Cur'*, He must be arraigned, and then he may plead his Release, or *Auterfoits Acquit* 219

Apprentice. Vid. London.

Indictment for refusing to provide for a poor *Apprentice* 163
 Indictment for enticing an *Apprentice* to depart, is naught 182, 288
 Bond to make *Apprentice* free at the End of 7 Years, or 8 Years, if requested, how to be construed 227, 259

Archdeacon.

How *Archdeacon* may grant *Administration*, and how to be pleaded 134
Arrest.

The TABLE.

Arrest.

Of <i>Arresting</i> one going from Court,	Page 90
Motion to discharge one arrested on a <i>Sunday</i> without Warrant	96
The Bailiff pronounced an Arrest, but laid not Hands on the Party, it is no Arrest nor <i>Rescous</i>	173
One hinders a Bailiff from <i>arresting</i> a Man, it is a Contempt to the Court, tho' no <i>Rescous</i>	210
Bailiff stays below at the Street-door, and sent his Follower with the War- rant up three Pair of Stairs in Dis- guise, who laid Hands upon the Pri- soner, and told him he arrested him: The Prisoner got from him, and ran down to the first Floor: The Defen- dant, being below in his Shop, ran up before the Bailiff, and opened the Door, and put the Prisoner in, and would not suffer the Bailiff to go and take him, <i>Quære</i> , If a good Arrest	211

Assault. Vid. Battery.

Assumpsit. Vid. Case.

<i>Indeb. assump.</i> by one Partowner against the other	264
Special <i>Assumpsit</i> , for that J. T. having a Rent-charge out of the Defendant's Lands, would save harmless against Distresses, &c. promis'd to pay such a Sum: If there be no Right of Di- straining appears, it is no good Con- sideration	265
<i>Indebitatus Assumpsit</i> lies not for Mo- ney won at Play	128
Nor upon mutual Promises	129
Nor upon a Bill of Exchange against the Acceptor	Ibid.
A special <i>Assumpsit</i> for Money won at Play, and how to be brought	Ibid.
<i>Indebit' Assump'</i> by Executor, for Mo- ney of the Testator received to the Use of the Executor	161

<i>Assumpsit</i> on the Defendant's inconfide- rately promising to pay two Grains of Rye, and so on by progression Arithmetick	Page 305
<i>Assumpsit</i> after the six Years, brings the Matter out of the Stat. of <i>Limitati- ons</i> ; but owing of the Debt goes not so far	309
No <i>such Thing</i> as a Promise in Law, &c.	131

Attachment. Vid. Attorney.

Process upon <i>Attachment</i> in London	78
Rule for an <i>Attachment</i> on an <i>Affida- vit</i> , <i>Nisi Causa</i> , for a Rescue	141

Attorney. See p. 191.

Judgment upon an <i>Attorney's</i> appearing without a Warrant	16
<i>Attachment</i> against an <i>Attorney</i> for pro- curing one to be turned out of quiet Possession	Ibid.
Two brought Error by two <i>Attornies</i> ; one <i>Attorney</i> assigns Error, the other pleads, &c.	40
<i>Attorney</i> promising to appear	42
Contempt upon <i>Attorney</i> undertaking to appear for a Defendant	86
Bill against <i>Attorney</i> , when to be filed	106, 175
<i>Attorney</i> of the <i>Common Pleas</i> pleads to the Jurisdiction of the Court; he shall not be sworn to his Plea, nor shall the Writ be set out at large	114
<i>Attorney</i> taking Money of a Man, and not doing his Business	187
Plaintiff declared as Clerk of the Court: Defendant pleaded he was <i>Attorney</i> of the Court, <i>absq; hoc</i> , that he is a Clerk of the Court: Plaintiff replies, he is a Clerk of the Court, <i>prout patet per Record' inde residen' in Cur,</i> &c. and prays the Record may be inspected: The Plaintiff is regular in his Pleading, and if Defendant will not join Issue, Plaintiff may sign Judgment	306

The TABLE.

Averment. Where immaterial, and the Issue impertinent Page 3 Rule of <i>Averment</i> upon Actions in an inferiour Court, to shew it to be within their Jurisdiction 223 Plea ill for want thereof 306 Avowant. Pleads a particular Estate, without shewing who had the Fee 223 Award. Construction of <i>awarding</i> Suits to cease 34, 35 Construction upon the <i>Awarding</i> a Release Ibid. If one Point be final, the <i>Award</i> good for so much 35 To pay 10<i>l.</i> in full of all Demands, how far extends Ibid. The <i>Awarding</i> a Sum of Money is a Bar of Action Ibid. When <i>Award</i> shall be said ready to be delivered 82 Of Parol <i>Award</i> 160 Debt on Bond to perform an <i>Award</i>, <i>Ita quod</i>, &c. no <i>Award</i> is pleaded, and a Parol <i>Award</i> set out; If Parol <i>Award</i> may be said to be delivered as well as one in Writing 160 <i>Award</i> ready to be delivered, how to be understood Ibid. If <i>Award</i> of collateral Matter in Satisfaction of Damages, be a good Plea in Bar, without alledging Performance 222 Partition <i>awarded</i>, and not shewed how to be 231 <i>Dimidia Pars, Medietas</i>, Construction Ibid. <i>Award</i>, that a Suit in <i>Chancery</i> between the Parties shall be dismissed, good 232 The Extent of the Words, (<i>Demands</i>) in an <i>Award</i> Ibid.	A stated Rule in <i>Awards</i>, that are to be <i>de & super Præmissis</i> Page 232 <i>Award</i> to pay Costs of Suit depending in an inferiour Court 245 Debt on Bond for Performance of an <i>Award</i> 244 Where the making of an <i>Award</i> is the Date of it Ibid. <i>De & super Præmissis</i>, how far extended Ibid. <i>Award</i> uncertain, and so not final Ibid. The <i>Award</i> of the Writ of Inquiry was, <i>Ideo Præceptum est Vic' London quod Inquirat</i>, and amended, 306 B. Bail. Common <i>Bail</i> for Feme Covert (<i>105. Vid. Feme</i>) 17 <i>Bail</i> discharged upon poor Prisoner's confessing the Action 22 The Time to except against <i>Bail</i> after Notice 24 <i>Bail</i>, upon a <i>Certiorari</i> to remove an Indictment 33 If <i>Bail</i> in Error upon a Bond for the Return of a Ship 58 Warrant of Attorney to confess Judgment to save the <i>Bail</i> harmless for so much Money receiv'd by him to their Use as Executor 77, 91 Sheriff takes one <i>Bail</i>-Bond upon a Debt by three jointly and severally. Plaintiff takes an Assignment, and would have the Sheriff amerced. Agreed that the Bond was not according to the Statute 122 If the same <i>Bail</i> be to the Action after the Assignment, Plaintiff may except against them Ibid. <i>Regula</i> in <i>B. R.</i> if Debt be brought upon a Recognizance in <i>B. R.</i> the Defendant hath 8 Days in full Term to render the Principal 132
--	--

The TABLE.

Of Proceedings on *Bail-Bond* in *C. B.*
and *B. R.* Page 132

Irregular to proceed on a *Bail-Bond*
till *Effoin-Day* of the next Term 226

Bail may render the Principal when
they please, and take him upon a
Sunday. So may a Sheriff take an
Escaper 231

At what Time *Bail* may surrender the
Principal, tho' Notice be not to the
Plaintiff 238

When *Bail* above upon removing a
Cause by *Hab' Corp'* 242

The *Bail* in Circuit-time charge the
Principal with 4000*l.* and was soon
after charged with the Queen's Debt 247

In Case of *Bail*, if the Recovery were
for more than is mentioned in the
Ac etiams, the *Bail* not to be charg-
ed 266

Caution against extravagant *Ac etiams*,
and excessive *Bail* 267

Scire fac' against the *Bail*, who plead
no *Capias* sued within the Year 139, 304

If Defendant dies after *Capias*, and be-
fore the Return of it, the *Bail* is dis-
charged 305

Motion to make a *Bail-Piece* and *Red-*
didit se, according to the Writ up-
on an Escape brought, but denied 309

A Prisoner for Debt under 100*l.* dis-
charged pursuant to the late Act, and
after was taken again for above 100*l.*
He must find special *Bail* 301

One cannot move to stay Proceedings
upon a Bond for Payment of Prin-
cipal, Interest, and Costs, till *Bail*
put in 11

Debt upon Recognizance against the
Bail. Plea, that there was no *Capi-*
as against the Principal, v. 304. Repl.
That there was. Rejoin. That a
Writ of Error was allowed before
the Return of the *Capias* 139

Judgment upon a Recognizance by *Bail*
157

Common Forms of declaring upon Re-
cognizances against the *Bail* Page 159

Bankrupt.

Action on a simple Contract by Assignee
of a *Bankrupt* by Commissioners,
how to be laid, viz. the Promise
must be to the *Bankrupt* himself,
unless expressly made afterwards to
Assignee 131

Baron and Feme. Vide Feme.

Baron and Feme Executors. They de-
clare in *Indeb' Assumpsit* as Execu-
tors. If upon Nonsuit, they shall
pay Costs 91

Husband leaves his Wife. Plaintiff en-
tertaines her, and brings an Action a-
gainst the Husband for her Diet and
Lodging 171.

Of Baron and Feme acknowledging a
Deed in Court 263

A Man and his Scolding Wife in a
Writ of Error, and Judgment upon
the Indictment, come in Person to
assign Error upon the Indictment of
the Woman for being a common
Scold, and did 213

Action against Administratrix, who in
her Husband's Life-time dealt sepa-
rately, in selling Tea, on a Bargain
by her then made 162

Battery.

In the King's Court 75, 76

What Assault makes a *Battery* 149

Spitting in the Face is a *Battery* 172

Bills of Exchange. Vide Merchant.

Difference of Bills of Exchange 29, 30

Protest by the Statute 9 *W. 3.* is for the
Benefit of the Drawer 81

Error upon an Inland Bill of Exchange
not protested 80

Interest

The TABLE.

Interest upon a Bill of Exchange Page
138

Bond. Vide Bail, Obligation.

Bond to be specified, or not 167, 184
One cannot move to stay Proceedings
upon a *Bond* for Payment of Prin-
cipal, Interest and Costs, till Bail put
in 11
Bond or Note of 20 Years standing 22
Diversity between the Condition of a
Bond when it is a Duty, and when
to do a collateral Act 227

Boroughs.

Two Sorts of Boroughs 51
Woman indicted at the Quarter-Sessions
of a Borough 220
Discent of Borough-*English* 120
Difference between Gavelkind and Bo-
rough-*English* 121

Bridges. Vide Ways.

Information for not repairing a Com-
mon Bridge, *ratione tenuræ* 150
—— For suffering a Bridge to be out
of Repair *Ibid.*
Error of a Judgment upon Indictment
for not repairing a *common* Bridge 255
Motion for a new Trial for not repair-
ing a Bridge 307
By-Law, concerning free Porters in
London 123

C.

Cape.

Grand Cape and Petit Cape. *Vid.* 4, 6.

Actions on the Case.

Case may be where the Party hath
no other Remedy,

Actions on the Case for Words.

You stole my Box-Wood Page 23
You have stolen my Timber, actionable,
and why? And other Words for
stealing 23, 24
Case for scandalous Words of a Justice
of Peace, and Chancellor of a Con-
fistory Court, *There goes your rare*
Chancellor, to suborn Witnesses against
the Parson 200
To say one *stole a Deer*, without aver-
ring it to be a tame one 104
Words spoke at several Times in Defa-
mation of a young Woman. Verdict,
and entire Damages, the first Words
not being actionable 148
Scandalous Words spoken of a publick
Officer, and in Reference to his Of-
fice 201

Case for Torts.

For a Disturbance of Right of Common 19
For stopping Lights 116, 313, 314
Difference between charging a Wrong-
doer and the Tenant of the Land 312
For malicious Prosecution 25
For malicious indicting the Plaintiff's
Wife of Felony, how the Plaintiff
ought to proceed in this Action 216
For malicious indicting of Barratry 261
Case for not repairing the Wall of his
Vault, &c. 311
For rescuing a Person on mean Process,
and the Evidence 211
For an Escape on Process out of inferi-
our Court, if it ought to shew the
Authority of the Court 72
For *conspiring* to vex and oppress the
Plaintiff, Case 169
Indictment for *Conspiracy* lies before
Acquittal; but Case lies not till Ac-
quittal 137
Case for using the Trade of a Woollen-
draper contrary to Custom 21
Case upon a Writ for Election of Mem-
bers of Parliament 45
For

The TABLE.

For Obstructing his Vote, and what Remedy Page 45, 46, 47
Whether the Action ought to be till the Parliament hath determined the Right 49

Case on Assumpsit.

Case upon mutual Promises of Marriage, and no Evidence of her express Promise 172
How one may declare in Case upon his Possession, against a Wrong-doer 19, 21

Certiorari.

If an Order be removed by *Certiorari*, on which Appeal lies; before Appeal it ought not to be filed till the Court is informed of the Matter, and then they will grant a *Procedendo* notwithstanding the *Certiorari*, 40
Vid. 43
When a *Certiorari* may not hinder Execution, &c. 33, 43, 83
Certiorari ad Informand' conscientiam Curiae 206
If the Court may send a *Certiorari* after *In nullo est erratum* pleaded *Ibid.*
Certiorari ex Officio, the Form of Entry 208
Bail upon a *Certiorari* to remove an Indictment 33
Certiorari where Error don't lie 17

Church.

If a profess'd Church-man may go to Meetings 190
Mandamus to swear in Church-wardens, and the Return 89
Libel for not coming to his Parish-Church on Sunday, and not receiving the Sacrament 188

Exposition of Stat. 1 *Eliz.* [to his own Parish-Church, or some other] Page 189

Clerk.

Parish-Clerk sues Church-wardens in the Spiritual Court for Money due by Custom 252
Clerk of the Peace convicted of Misdemeanors, as for taking excessive Fees 192

Collectors and Assessors of Taxes. Vide Indictment.

Common.

Prescription for *Common* for Cattle levant and couchant, good to a Messuage or Cottage 114

Composition &c. See Covenant.

Conspiracy. See *Case* and p. 100, 137, 138, 185, 186

Constables.

Ale-Sellers not qualified to be Constables 42

Contempt.

What is a *Contempt* 43
Contempt against the Privilege of the Queen's Palace 73
Commitment for *Contempts*, &c. to answer Interrogatories in Custody *Ibid.*

Continuando.

What Things may be laid with a *Continuando* 38
How the *Continuando* ought to be laid 39
4 N Con-

The TABLE.

Construction of *Secundum consuetudinem*
Curie of inferior Court Page 61

suit, though he declare as Executor
Page 181

Conviction.

Conviction by Act of Parliament, as for
imbezilling Yarn, *per Stat. 7 Jac.*
i. c. 5. Before Justices must be after
Summons: (*Vid.* Summons) 41
Procedendo upon a Conviction removed
by *Certiorari* 17

Copyhold.

No Occupancy of a Copyhold Estate, for
two Reasons 66
Custom to grant Copyhold to three Per-
sons *successive, sicut nominantur in*
Charta 63
Lord that may grant for three Lives
may grant for one 68
Pleading a Copyhold Estate, *viz. ad vo-*
luntatem Domini, &c. 19, 20

Corporations.

Of Declarations against Corporations
Aggregate, can't be as *in custodillarr'*
183
Of their electing Parliament-men 52

Costs.

Costs and Damages their Diversity, &c.
157
No Costs for the Defendant, if he hath
Judgment on Demurrer 88
Wife Executrix, and Husband and Wife
declare as Executors *sur Indebit' Af-*
sump', if upon Nonsuit, they shall
pay Costs 91
In Trover upon the Executor's own Pos-
session, he shall pay Costs 92
Where Costs to be paid upon Nonsuit 94
Where the Defendant ought to have
Costs upon the Plaintiff's being non-

Covenant.

Covenant by Lessee against Lessor: De-
fendant pleads he entered to distrain,
and traverseth the *Ouster*: Plaintiff
demurs. Judgment *pro* Defendant
150
Covenant brought by an Apprentice 154
How the Act of *Composition* ought to
be pleaded 58, 156
Oyer of the Body of the Deed of Cove-
nants, is not compleat without *Oyer*
of the Indorsement, (if there be one)
237
The Nature of an Indorsement *Ibid.*
Covenant against Husband and Wife up-
on a Demise to her *dum Sola* 239

Counsellor, &c.

His Privilege to have a Trial at Bar,
123
Formerly an Attorney, accused of Fraud
and Extortion 137

Court Inferior.

Rule of Averments upon Actions in *In-*
ferior Courts, to shew it to be with-
in their Jurisdiction 223
Where it is hard to hold the Defendant
to his *Confession* in pleading, or not
10

Custom.

Three Reasons to support a Custom
412

D.

The TABLE.

D.

Damages. Vide Costs.

Declaration.

RULE upon *Declaration* delivered in *Hillary Term* Page 22
 The Fact seemed to be laid before the Cause 33
 But if the *Declaration* was after, it should be right *Ibid.*
 The first *Declaration* will help the second 129
 Of leaving *Declarations* in the Office 153
 Recital of a Deed to lead the Uses of a Fine, whether Evidence 45

Default.

Default after Issue in real and personal Actions, and the Consequence 4, 5
Default peremptory, where 5
 Where Judgment shall be upon the Demurrer, or the *Default* *Ibid.*
 Diversity as to the *Defaults* of the Defendant, or the Plaintiff 6
 Where Demurrer waived by *Default* in a personal Action 7
 When Inquest may be taken by *Default*, before Count or after *Ibid.*
 Judgment by *Default* after Demurrer joined 9

Demand.

See the Difference where a Duty is payable on *Demand*, and where it is no Duty till *Demand* 200

Demurrer.

Demurrer joined in Paper, and Plea allowed to be changed 38
 Difference of *Demurrers* 118

Deodand.

Forge-Wheel, if a *Deodand* Page 187

Devise.

Whether Fee-Farm Rents will pass by the general Words, *Of all my real and personal Estate* 106, 107
 How if it be with the Words, *Not otherwise disposed of* 107
 The Word [*Estate*] will pass a Freehold as well as a Chattel *Ibid.*
 Construction of the Word [*Estate*] *Ibid.*
 Exposition of general and particular Words in the Clause of the Will 108
Residue of the Estate (to what the Word *Residue* relates) *Ibid.*
 (*Una cum*) in a Devise, how it extends 108, 109
 Construction of the Words [*All my Estate*] in a Will 110
 Rule of a *Devise* to a particular Purpose 111
 The Words [*Not otherwise disposed of*] how to be expounded *Ibid.*
All the Rest and Residue, if by the Word [*Rest*] a Reversion may pass *Ibid.*
Devise to an Heir at Law, paying, &c. and for *Default* thereof, Remainder over; the Heir till *Default* is in by Descent 241

Distress.

Distress for a Parish-Rate upon Tenant of Part of an House, made before Quarter-day by Virtue of a general Warrant 214
 Whether if Inhabitant coming in three Weeks before the Quarter-day may be rated *Ibid.*

Case

The TABLE.

Cafe for rescuing Goods, the Plaintiff
had *distrained* for Rent upon a De-
mise from Year to Year Page 215
Distress, when to be removed *Ibid.*
Justices Warrant to levy by *Distress* up-
on a Deer-stealer 83

E.

Ejectment.

IN *Ejectment* for five Years after Ver-
dict for the Plaintiff, he was delayed
of Judgment and Execution by In-
junction, till the Term ended; moved
to renew the Term, but denied 130
In *Ejectment*, Possession of one Jointen-
ant is Possession of the other 44
In *Ejectment*, one trick'd out of Posses-
sion, and the Manner 73
If one pretend Title to the Land, give
Security to the Tenants to save them
harmless upon paying him the Rent;
and after another recovers in *Eject-*
ment against them, they have no Re-
medy against the Security, till, &c.
Sci' fa' upon a Judgment in *Ejectment*,
not amended 310
Recovery of the mean Profits, which is
from the Time of the Action brought,
and without actual Entry, there can
be no Recovery of the Profits 222
Entry upon a part demised and not with-
in an *Exception* 45
Abuses in *Ejectment* as to nominating
Lessees, &c. 309

Error.

Denying a Repleader where it ought to
be, is *Error* 2
Two brought *Error*, and made two At-
tornies; and of the Assigning *Error*
by them 40
Judgment affirmed, another Writ of *Er-*
ror having been before, and returned
61

Error for Want of an Original, and a
Release of *Errors* pleaded Page 113,
235
Error assigned for Want of an Original,
174, 206
Difference between *Errors* in Law, and
Errors in Fact 207
Error of a Judgment in Debt by Con-
fession, and Want of an Original as-
signed for *Error*, and certified: De-
fendant pleads a Release, but no *Ve-*
nue laid: Plaintiff demurs. *Quære*,
Whether the Court, being informed
that there was an Original below,
could by Law award a *Certiorari ad*
Informand' Conscient' before they re-
versed a Judgment for a just Debt
206
Time to except against Bail put in up-
on a Writ of *Error* 230
Writ of *Error*, no *Supersedeas* till No-
tice 130
How to prove Entry and Claim 44

Escape.

Where one Excommunicated, &c. *E-*
scaping may be taken *de Novo* 78,
79
Of *Escape* upon mean Process, and re-
taken by an *Escape*-Warrant 21
Intent of the Act against *Escapers*, and
a new Rule made 22
Two Coroners, one insolvent, suffers an
Escape; whether the other shall be
charged 37
One taken up upon an *Escape*-Warrant,
yet common Bail, and why 63
The Retaking of an *Escaper* on a *Sun-*
day by a Judge's Warrant, is lawful
95
For *Escape* in the Testator's Life-time,
the Executor may have Debt against
the Jaylor 125
The Sheriff returns a Warrant, That
one who had *escaped* out of B. R.
was taken up upon an *Escape*-War-
rant 154, 254
One

The TABLE.

One *Grant* voluntarily suffered to *escape*, voluntarily returned, and being detained, brought Action Page 183
Bond may be given to save the Warden against all past *Escapes*, but not against future; *Qu'* 225
T. in *Newgate* upon *Escape* Warrant, and discharged, was after arrested, and in *Custod' Mar'* 253

Escrow.

Debt upon a Bond; Plea delivered as an *Escrow*, and *issint non est Faetum*, Replic' with a Traverse of the Defendant's Plea, and Issue thereon 217, 218
Where one taken on an *Excommunicato capiendo* Escaping, may be taken *de Novo* 78, 79

Executor.

A Recovery was against the Defendant, and Judgment against him *de Bonis Testatoris*; then Action is brought by the *Executor* on the first Judgment, and suggests a Wasting the Assets, the Debt not being satisfied 125
For Escape in the Testator's Life-time, the *Executor* may have Action of Debt against the Jaylor *Ibid.*
Where *Executor* shall answer for no more than he received: Where the Value of the Goods shall be Assets 182
Where voluntary Payment by an *Executor* is a *Devastavit* 144
Indebit' Assump' by an *Executor* for Money of the Testator's received to the Plaintiff's Use 151
Capias returnable such a Day, and *Execution* of it *sedente Cur'*, good, *secus* not
Executor, when estopp'd in his Evidence of Want of Assets by suffering Judgment by Default 308
When an Estoppel runs upon the Land, it alters the Interest of it 258

Debt by Administrator *durante Absentia* of the Executor Page 304

Execution. Vid. *supra*.
Vid. *Sheriff*.

When *Execution* is compleat upon *Hab' fac' Possession'* 27
If a *Cesset Executio* be for a Year, *Execution* may be within the next Year without *Sci' fa'* 288
Execution is an intire Thing, and the Consequence 298

Exposition of Words, &c.

<i>Alta via Regia</i>	255
Causing, Procuring, &c.	99
<i>Colore</i> , &c.	170
<i>Communis</i>	256
<i>Conquerantur</i>	56
Costs	157
<i>Debet & Solet</i>	312
Default of another	249
<i>Dimidia pars</i>	231
Estate	107, 109, 110
<i>Falso & Malitiose</i>	32
<i>Inde</i>	262
Kneave of Land	140
<i>Liberum Tenementum</i>	117, 118
<i>Malitia præcogitata</i>	33
<i>Medietas</i>	231
<i>Piscerunt</i>	183
<i>Prætersum</i>	302
<i>Prætentum</i>	170
<i>Prætextu</i> , &c.	<i>Ibid.</i>
<i>Procuravit</i>	32
<i>Publicus</i>	256
Remainder	112
Residue	108
<i>Secundum Conf. Curiae</i>	61
<i>Solebat</i>	312, 313
<i>Statum</i>	109
Subornation	202
<i>Unacum</i> , in a Devise	108, 109
<i>Via regia</i>	255
<i>Volentibus</i>	188
<i>Extortion</i> , &c. See p.	192
4 O	Evidence.

The TABLE.

Evidence. Vid. Witness.

Where an Order, or bare Commission of
Chancery, is no *Evidence* Page 149
Evidence of the Return of a *Mandamus*,
 by Copy of the Writ and Return in
 the Office 152
 The Counterpart of a Deed lost, admit-
 ted for Evidence 225

F.

Feme Covert.

WIFE indicted by her Husband,
 admitted in *Forma Pauperis* 88
Feme Covert, after Bail-Bond given, may
 plead *Misnomer* 311
Feme Covert arrested, where common
 Bail to be received 105
Feme Covert, after parting from her Hus-
 band by Consent, and Maintenance
 allowed, commits Adultery, and runs
 her Husband into Debt, if he shall
 be charged 147
 Upon *Non Assumpsit*, a *Feme Covert*
 may give Coverture in Evidence 230

Fieri Facias.

Fieri fa' to the Sheriff before Judgment
 entered, and the Value levied 184

Fine.

Fine by one Jointenant of the whole
 Fee, *Quid operatur* 45
Lawful Fishing 73
Indictment for *Fishing* in his Pond 183

Fraud. Vid. Indictment.

Captain of a Ship takes a Receipt, and
 gives a Note upon a third Person,
 who failed before the Note was due,

and the Captain was gone to Sea; the
 Receiver useth Diligence to get such
 Note paid, but cannot: It is *Fraud*
 in the Captain Page 147
False Token and Combination 302

G.

GAME, found upon a Man, sup-
 poseth Proof made 57
Gavelkind, a general Custom 120
 Difference between *Gavelkind* and *Bo-*
rough-English 121

H.

HAND cut off, &c. for striking in
 the King's Court 75, 76
 Execution upon *Habere fac' Possessionem*
 115
Heriot Service, &c. 64
 Husband and Wife. See *Feme Covert*.

I.

ACTION brought against an *Inn-*
keeper for not safely keeping a
 Gelding 223
 See the Statute of *Jeofails Explained*
 4, 5, 285, 286

Indictment.

For being a *Common Scold* 11, 178
 213, 239
Communis Deceptor is too general 311
 A Clerk in Court may confess an *Indict-*
ment for his Client 16
Indictment on the Statute 14 *Car.* 2. for
 abusing a *Custom-house* Officer 17
Indictment against a Justice of Peace and
 others, for arresting *M.* upon a pre-
 tended Warrant, knowing it to be
 forged 30
 A dis-

The TABLE.

A dissolute Person kill'd Hares, was indicted, and <i>Indictment</i> quash'd, because not said he was not qualified <i>Page</i> 40	<i>Indictment</i> for falsely confederating a Man to be the Father of a Bastard Child, 100, 185. If the Party ought not to shew himself to be innocent <i>Page</i> 185
<i>Indictment</i> for cheating in a Foot-Race 42	<i>Indictment</i> of a Petit Chapman 240
<i>Indictment</i> for False Affirmation of Value upon Sale 61	<i>Indictment</i> for Fishing in his Pond 183
In what Cases <i>Indictment</i> lies after Recovery in Trover, or not 71	Quakers <i>indicted</i> for keeping Shop open on an Humiliation Day 210
No <i>Indictment</i> where a Statute gives a Penalty 86	Upon <i>Indictment</i> for a Riot against a great Number, to try it only against three or four 212
<i>Indictment pro 5 Sarcinis</i> 87	Words directly tending to the Breach of the Peace, <i>indictable</i> 125
Wife indicted by her Husband, admitted in <i>Forma Pauperis</i> 88	A Woman <i>indicted</i> at the Quarter-Sessions of a Borough for exercising the Trade of a Goldsmith, not having been Apprentice seven Years 220
Exception to an <i>Indictment</i> of Entry into Land, not said <i>Manu forti</i> 96	Difference between <i>Indictment</i> and Information, as to bringing on to Trial 246
<i>Indictment</i> for perswading and causing an Apprentice to leave his Service, 99. If it be an Offence indictable, and the <i>Indictment</i> ill for Want of Allegation of Absenting 101	In Crown-Causes there cannot be <i>Nisi prius</i> or <i>Tales</i> without a Warrant from the Attorney General <i>Ibid.</i>
<i>Indictment</i> for coming as sent by another to receive Money: If it be indictable 105	The former Practice concerning Removal of <i>Indictments</i> by <i>Certiorari</i> , and how it is now <i>per Stat. 5 & 6 W. & M.</i> <i>Ibid.</i>
After an <i>Indictment</i> , how the Defendant's Plea may be reserved 114	The Defendant shall never carry an <i>Indictment</i> removed hither by the Prosecutor to Trial, without Leave of the Court 247
<i>Indictment</i> for Words spoken to the Mayor of Salisbury in Disparagement of the Government, <i>You, Mr. Mayor, I don't care a Farthing for you; You, M. Mayor, are a Rogue and a Rascal</i> 124	If Entering of a <i>Non Prof'</i> be good Evidence to prove the Declaration in <i>Indictment</i> of Barretry 261
<i>Contra Pacem</i> omitted in an <i>Indictment</i> 128	<i>Inde acquietat'</i> goes to the Fact charged, and not to the <i>Indictment</i> 262
<i>Indictment</i> for wilful Perjury, reciting the Record of the Trial to be a feigned Issue out of Chancery 167	When <i>Nolle prosequi</i> upon <i>Indictment</i> first began <i>Ibid.</i>
Variance assigned between the Record recited and the <i>Indictment</i> 168	Two Collectors and Assessors of publick Taxes <i>indicted</i> for their Injustice and Partiality in their Taxation, and adjudged to the Pillory 306, 307
<i>Indictment</i> for tearing an Account after it was settled 175	In an <i>Indictment Communis Deceptor</i> is too general 311
<i>Indictment</i> for causing M. to be arrested and committed to Gaol, laid in Irons, and extorting Money 178	<i>Indictment</i> for cheating the Prosecutor in a Parcel of pretended Port Wine 301
The modern Practice of taking up the Party before the <i>Indictment</i> found 179	See an Imparance on an Information 243
To set up a Fair, Market, or Leet, <i>indictable</i> 183	Inquisition.

The TABLE.

Inquisition.

Of Forcible Entry, Motion to quash it
for Want of the Words, *Ad inqui-*
rend' Page 95
No Exception against a Juror upon a
Writ of *Inquiry* 43
Vide Of Executing a Writ of *Inquiry*
after the Return 159. And of quash-
ing or superseding it 40

Interest.

What Notes, &c. carry *Interest* 167

Judgment.

Judgment final, where 5
Where *Judgment* shall be upon the De-
mur', or upon the Default *Ibid.* 6
A Man out of Court may have *Judg-*
ment against him, tho' not for him
10
The ancient Manner of Pleading in Ar-
rest of *Judgment* 143
A Warrant to confess *Judgment*, and
Agreement to stay *Judgment* for a
Year, how the Year shall be reckon-
ed 14, 288
Judgment upon an Attorney's appearing
without a Warrant 16
When to move in Arrest of *Judgment*
24
When the Court will not let *Judgment*
(neglected) after a Rule to be entered
59
Judgment of a Precedent *Hillary* Term,
and the Plaintiff died before Costs
settled, and next *Hillary* Term *Judg-*
ment being entered as of the first *Hil-*
lary Term was set aside 191
How *Judgment* may be or not be when
the Court is divided 203
Judgment upon a Warrant of Attorney,
when to be entered 212
Judgment by *Nihil dicit*, how entered
in *B. C.* how in *B. R.* 236
Time of signing *Judgment* 191, 241

Jurisdiction.

Plea to the *Jurisdiction* of an inferior
Court tendered after the Court was
up Page 146
The Oath ought to be upon Tender of
the Plea *Ibid.*

Justices.

Order by two *Justices* recites Oath made
before one of them by the Mother of
a Bastard Child, who was examined
by one of them, and ill 180
Where *Justices* of Peace cannot dele-
gate their Authority to others to make
Rates and Orders 87
Upon *Justices* of Peace False Returning
Inquisition of Forcible Entry, and
the Affidavits thereof, how to be
heard 90
Justices of Peace, their Authority con-
cerning Wages 91
If the *Justices* make a subsequent Or-
der directly contrary to a former of
the same Sessions, in the same Cause,
the subsequent one is an absolute Re-
peal of the former 287
Justification. See page 1
Corporation *Justices* lose their Exemp-
tion, by a Denial of *Justice*, and a
Mandamus may go to the County
Justices to act 164

L.

WHether the Statute of *Labourers*
extends to Garden-work 204
If *Labourers* in a Garden be in the
Justices Power 205
Lease of the Office of Marshal of *B. R.*
good 57
Leather, Allom'd Sheep-skins is such
166
Where a *Lessee* may grant above his E-
state, but not less by Custom of a
Copyhold 63
Of

The T A B L E.

Of pleading *Liberum Tenementum* 117,
Page 118, 119
 Of pleading the Statute of *Limitations*,
Vide Statute 25, 309, 240

London.

Apprentice to a Waterman's Widow extends not to a Freedom of *London*, but Trover lies for his Tickets 69

Return of a By-Law to pay for not weighing Goods sold by Foreigners at the ancient Beam in the City of *London*
123, 177

A By-Law returned concerning the Company of Free-Porters in *London*, and of employing a Stanger not Free

Gaol-Delivery of <i>Middlesex</i> , how	123
in <i>London</i>	145

Debt brought in *London* upon a Demite
of Lands in *Jamaica*,
Vide Obligation 194, 228

M.

Bandanus.

Attachment moved, for not returning a *Mandamus*, &c. 25

Where *Mandamus* ought to go to restore
to an Office 18

Information for a False Return of a
Mandamus by a late Mayor 152

The old Bailiffs of a Town obliged to
return a *Mandamus* 133

Mandamus, when amendable *Ibid.*

No *Mandamus* for an Approver of
Guns, nor Clerk of a Company 18,
82

Evidence of the False Return of a *Man-*
damus 152

*Mandamus to fwear a Church-warden,
and the Return* 89

Mandamus for reimbursing an Overseer
turned out 97

An argumentative Return upon a *Man-*
damus, is ill 309

*Mandamus to admit a Teaching-Diffen-
ter to qualify himself* *Page 310*

Martial Law not a fixed, but a transitory Law 180

Marshal turn'd out for Non-attendance
91

Leafe of Office of the *Marshal* of the
King's Bench, good 57

Marriage.

The Difference between a Contract *per Verba de præsenti*, and *Verba de futuro* 155

Merchants.

When Actions on Inland *Bills of Exchange* first began 29

Difference between Foreign, and Inland Bills *Ibid.*

Indorsee brought Action in the Indor-
for's Name 30

A Bill of Exchange may be made between two Persons, and how *Ibid.*

A Case concerning Payment of 60*l.* to
a *Merchant's* Servant by a Bill of Ex-
change, &c. on another who had
just failed before 36

If a *Merchant's* Servant may accept of a Bill of Exchange, without Authority to do it *Ibid.*

Whether such a Bill be Payment at all
Ibid.

How such Notes may be Payment, and
on whom the Proof lies 37

Where a Master is not bound by such
a Bill taken 37

Indebitat' Assumpsit by one Part-owner
of a Ship against another 264

Indebit' Assumpsit lies not upon a Bill
of Exchange against the Acceptor
129

Money.

Money brought into Court 11, 25,
101, 153

The T A B L E.

N.

N olle <i>prosequi</i> , when first used on Indictments	Page 262
The Effect of a <i>Nonsuit</i>	95
Of paying Costs on a <i>Nonsuit</i> by Executor: (<i>Vid.</i> Executor)	181
When a special <i>Non-tenure</i> may be pleaded	226
Notice of Trial: (<i>Vid.</i> Trial)	57, 58
What Notice ought to be given of Trials, and Executing of Writs of Inquiry	146
Defendant indicted for a <i>Nusance</i> in bringing a great Ship into <i>Billingsgate</i> Dock	145

O.

D EBT on Bond, or <i>Obligation</i> , not specified in Taxation according to the late Act	176
Debt on a <i>Bond</i> made, dated, sealed and delivered at <i>Port St. Davids</i> in the <i>East-Indies</i>	228
<i>Obligee</i> made a material Razure in the Condition: Motion, that the Bond shall remain in the Officer's Custody, allowed if Defendant had denied the Deed	233
Narr' in Debt upon a Bond, with Omif- sion of <i>quas ei debet & injuste detinet</i>	306
<i>Per Scriptum Obligatorium</i> , without shewing the Date of the Bond, or that it was executed, yet good	<i>Ibid.</i>

Offices.

If an Office described by the Statute has a certain Salary annexed to it, Deputation of such Office, reserving a Sum less than the standing Salary, will not be within the Stat. 5 & 6 <i>Edw.</i> 6. c. 16. But if the Fees be incer-	
--	--

tain, and no certain Salary annexed to the Office, reserving a certain Sum out of Fees, *aliter*, not within the Statute

Page 234

Quantum Meruit for a Deputy, having no Allowance

235

Lease of the Office of *Marsh.* of *B. R.* good

57

Officers indicted for Extortion, &c.

306, 307

If Justices may replace an *Overseer* removed

77

How the Order for a Poors Rate ought to be, and how the Account

98

Order of Settlement quash'd

163

See *Poor*

Overseer need not advance a Farthing of his own Money

97, 98

Of reimbursing *Overseers*

Ibid.

If a Clergyman without Cure may have a Writ to discharge him from being *Overseer*, &c.

140

If an *Outlawry* upon an Indictment be set aside, the Indictment stands good and open to proceed upon

115

No *Oyer* after general Impar lance, yet *Oyer* after Plea in Abatement, and why

27, 28

Of ancient and modern Demands of *Oyer* and Grants thereof

28

If a Release be pleaded, and the Plaintiff crave *Oyer* thereof, if the Defendant will not grant it, the Plaintiff may sign Judgment for Want of a Plea

122

P.

Papist Convict, not to prove a Will

239

Parish-Clerk

253

Of Election of *Parliament-Men*,

50, 51, 52, &c.

Of Staying Proceedings on Payment of Principal, Interest and Charges. *Vide*

11, 25, 60, 101

Peace,

The TABLE.

Peace, &c.

L. bound to the good Behaviour for his Rudeness to the Daughter of an Heiress Page 131
Demand of Security for the *Peace* ought to be fresh after the Affray given 132
How the Cause of Binding ought to appear Ibid.
What is Practising of *Physick* within the Statute 44
Indictment for wilful *Perjury* 167

Plea. Vide **Repleader.** Vide **Abatement.**

Plea ill for want of Averment 306
Conclusion of *Pleas* 236
Plea in Bar concludes in Abatement 103
If the *Plea* be Matter in Abatement, and concludes to the Action, how Ibid.
Defendant *pleads*, he ought not to answer because of an Action depending in *B. C.* 157
Excommunication and Outlawry to be *pleaded* under Seal 180
Where the Matter is indifferent, and the Party *pleads* over, the Court will intend it well; *aliter* where the shewing of a Thing is absolutely void 136
Special *Non est factums* disapprov'd 218
Per nomen 303
Where it is hard to hold the Defendant to his Confession in *Pleading*, or not 10

Poor.

Order for removing a *poor* Person confirmed at the Sessions on an Appeal, &c. 287

One Order made, and then a subsequent Order is made by the Justices the same Sessions on the same Cause; the last is an absolute Repeal of the former Page 287

Wife indicted by her Husband, admitted in *Forma Pauperis* 88

Where a Settlement of the Father gains a Settlement for the Child 87

Vid. Overseers, Settlement of a Child delivered 213

Vide ante **Overseers.**
Prerogative. See *Wreck.*

Presentative.

Some Churches are *Presentative*, some Donative, and some Stipendiary 230

Prisoner.

A Note discharging a poor *Prisoner* confessing the Action 22
The *Prisoner* also discharged after a Surrender Ibid.
A *Prisoner* for Debt under 100*l.* discharged by the late Act by the Justices of Peace, and afterwards was taken up again for above 100*l.* he shall find Bail 301

Privilege.

Of the *Privilege* of the Queen's Palace 74, 75
If that *Privilege* be confined to Residence Ibid.
The Right of Gentlemen at the Bar, to have a Trial at the Bar 123
The Queen's Attorney may try any of the Queen's Causes at the Bar Ibid.
Two Ways of pleading a *Privilege* of a Court in *Exchequer*, &c. 305

Prohibi-

The T A B L E.

Prohibition.

Before Appearance to stay Process of the Admiralty <i>de quadam Causa Salvagii</i>	Page 11
Motion for a Prohibition for Libelling in the Spiritual Court, to dissolve a Marriage because of a Precontract	155
A Contract <i>per Verba de præsenti</i> , and <i>Verba de futuro</i> , the Difference <i>Ibid.</i>	
A Prohibition to stay a Suit about Pews in a Church	230
Where after Sentence one may come too late for a Prohibition	252
Grounds on Suggestion for a Prohibition to the Consistory Court	308

Proof. Vid. Witnesses.

Upon bare Recital of a Deed of Uses upon a Fine, Proof to be made	45
Game found upon a Man, supposeth Proof	57

R.

Recognizance.

WHICH was taken at a Judge's Chamber, and set forth as if taken in Court	42
Recognizance for a Trial estreated	43
Failure, a Forfeiture of a Recognizance	<i>Ibid.</i>
Popish Recusant convict, not to prove a Will	239

Record.

Mistakes in filing Records, rectified	18
Upon a Writ of Error, if the Clerk below will certify the Record wrong, Case lies against him	245

If *Sci' fa'* recite a Judgment of *Trinity Term* in Debt, and the Tenants returned plead *Nul tiel Record'*, and a Judgment of *Michaelmas Term* is produced, this is a Failer of Record
Page 257

Remainder.

Of new created Rent, good	112
---------------------------	-----

Repair.

<i>Solebat Reparari</i> , where not good	313
Case between Buyer and Vendee of Houses	314
Where the Vendor reserves not the Benefit of Lights	<i>Ibid.</i>
Of Repairing the upper Chamber, and lower Foundation	<i>Ibid.</i>

Repleader.

When a Repleader shall be upon an immaterial Issue	2
In case of Repleader, where the Amendment must begin	<i>Ibid.</i>
No Costs on Amendment of Repleader	<i>Ibid.</i>
Repleader at Common Law, and when grantable	3
No Repleader where the Parties are out of Court by Default	<i>Ibid.</i>
If Repleader can be upon a Demurrer	102
If the Court award a Repleader where it ought not to have been, or deny it where it ought to be, it is Error	2

Replevin.

Upon the Defendant's being cheated in a Bargain	68
In Replevin, if Property be claimed, and notwithstanding the Party replevy, Trespas will lie	69
Claim of Property not allow'd makes a Trespasser	69, 139, 140

The TABLE.

If Appraisement may be in <i>Replevin</i>	Page 69
In a <i>Replevin</i> , Property in a Stranger may be pleaded in Bar	81
How the Defendant in <i>Replevin</i> may take Advantage of a Variance	103
<i>Replevin</i> for Cattle, Justification for Damage-fesant, how the Plaintiff may derive his Title, and traverse	158
Conuzance as a Distress for Rent; Bar, that the Cattle escaped by the Defendant's Ground for Want of <i>Repairs</i>	189
<i>De homine replegiando</i>	84
In <i>Replevin</i> and Plea in Bar, with an <i>absq; hoc</i> : Replicat' to Issue, Demur' to the <i>Replevin</i> , and concludes in Abatement, Judgment final in <i>B. C.</i> for the Plaintiff, and affirmed in Error	102
Where <i>Restitution</i> of Goods taken in Execution shall be or not	297, &c.
<i>Re-entry</i> , where must be laid on an <i>Ouster</i>	39
Construction of the Word [<i>Remainder</i>]	112
Inquisition taken for a <i>Riot</i> made <i>contra formam Statuti</i> , and good	

Return.

Difference between Proceedings begun in <i>B. R.</i> and Proceedings brought up by <i>Certiorari</i> , as to <i>Returns</i>	268
Writ of Inquiry returnable <i>ad tres Trin'</i> , which being <i>Sunday</i>	148
Of <i>Sunday</i> , and the <i>Return Days</i>	<i>Ibid.</i>
The Calendar is settled by Law, and Part of it	251, 252
If a Writ may not be legally executed the Day of the <i>Return</i> , it shall not the next Day	159
Fifteen Days between <i>Teste</i> and <i>Return</i> of Procefs	146
<i>Remitter</i> by Attorney: <i>Retraxit in propria Persona</i>	82

Request.

Where material	Page 200, 227
<i>Request</i> , how to be made; and Difference when a Time is appointed for doing a Thing on <i>Request</i> , and when not	260

Rescous. Vide Arrest.

A Difference where on mean Procefs, and where on an Execution	141
---	-----

S.

Scire facias.

T O repeal Letters Patents	220
<i>Scire facias</i> on a Recognizance, that they and either of them <i>recognovit</i>	197
Two <i>Scire facias's</i> of the same <i>Teste</i> , ill	86
<i>Scire facias</i> by Administrator, to warn in Tertenants upon a Judgment obtained by the Intestate against <i>S.</i> at <i>Westminster</i>	134
<i>Scire facias</i> against Tertenants, they all appear and plead jointly	226
Plea in Abatement of a <i>Scire fa.</i> that <i>J. S.</i> was a Tenant, and not summoned	199
Amendment of <i>Scire fa.</i> where	263, 286

Vide Record.

Sheriff.

If a Man hath Judgment, and sues <i>Fi. fa.</i> and Goods are seized on, and then the Plaintiff dies, the Sheriff must sell, and give the Money to his Executor	4 Q
---	-----

The TABLE.

tor or Administrator	Page 290
	See <i>Salk.</i> 322 acc.
That the Sheriff may sell without a <i>Venditioni exponas</i> , and when	291,
	294, 297
Whether the Administrator <i>de Bonis non</i> shall have the Money	<i>Ibid.</i>

Statutes.

Title of Statute no Part of the Law, Effect of the Preamble	62
Statute of Limitations	25
Statute of Composition of Two Thirds, &c. pleaded in Bar	58, 156
Statute 1 <i>Jac.</i> 1. c. 22. whether allom'd Sheep-skins be Leather within the Act	166
Statute 8 & 9 <i>W.</i> 3. of Labourers	
Statute of Conventicles. (<i>Vid. Cafe.</i>)	228
Statute 9 <i>W.</i> 3. of protesting Bills of Exchange	81
Statute 23 <i>H.</i> 8. of paying Costs	91
Statute 5 & 6 <i>W.</i> & <i>M.</i> c. 2. of Removals by <i>Certiorari</i>	246
Expl' Statute of Frauds and Perjuries, of answering for the Default of another	249
Statute 17 <i>Car.</i> 2.	293
Remedy for Administrator <i>de Bonis non</i> , per Stat. 17 <i>Car.</i> 2. after Verdict	290, 292
The late Act concerning Discharge of Prisoners for Debt under 100 l.	301
Statute of practising <i>Physick</i>	44

Summons.

Where necessary in order to a Conviction	41
--	----

Sunday.

What Arrests and other Acts are good thereon	95, 96
--	--------

T.

Tall.

W Here and how Issue in *Tail* may falsify a Recovery Page 296
Where Plaintiff must make Title, and where he need not 19, 313

Taxes, Collectors and Assessors thereof. Vide **Indiements**.

Trade. Vide 165, 166.

A Woman indicted at the Quarter-Sessions of a Borough, for exercising the Trade of a Goldsmith, not having been Apprentice seven Years 220

Travers.

Travers Virtute cujus, if traversable, 70
See p. 235

Trespas.

When the Acquittal of one Trespasser shall discharge the other 10
Trespas for taking away two Cows and several Loads of Wheat out of the Plaintiff's Close in *D. ac etiam* for taking away several other Things *de Bonis propriis* of the Plaintiff, *ibid'* *similit'* *invent'*, and Damages entirely assess'd. Exception was, for that the Loads did not appear to be his Goods, for the Words *de Bonis propriis* of the Plaintiff, shall be only of those Things after the *Ac etiams* 14
Trespas for breaking his Close, and hunting and killing his Rabbits, with a *Continuando* 38
What Things may be laid with a *Continuando* *Ibid.*

Trespas

The TABLE.

Trespass for entering the Plaintiff's House, and taking away his Goods: Justification by Process of Inferior Court for Non-appearance, but answers not to the carrying away Page 70

Trespass against Bailiff for Breaking an House, not an Attachment 105

In *Trespass*, where *Son Franktenement* is a good Plea 117

Liberum Tenementum, where it is traversable, or not *Ibid.*

Two Ways of Pleading *Liberum Tenementum* 119

Error of a Judgment in *Trespass*, where-as it was in Case; a great Diversity 113

In *Trespass*, the Defendant justifies in Aid of the Officer upon a Replevin: Plaintiff replies by a Claim of Property 140

Trespass tempore Will. 3. ill upon a Demurrer, help'd after Verdict 80

Trial. Vid. Notice.

Rule of Notice of *Trial* 18

Cause of a new *Trial* for Want of Evidence 22

Concerning a Term's Notice for *Trial* *Vide* 57

No new *Trial* after second Verdict of the same Side *Vide* 18

What is good Cause for a new *Trial* 307

In Civil Actions the Defendant cannot try a Cause by *Proviso*, till Default in the Plaintiff, except in some special Cases 246

But there can be no *Trial* by *Proviso* in the King's Case 247

Of *Trials* where the Queen is Party *Ibid.*

The Defendant shall never carry an Indictment, removed hither by the Prosecutor, to *Trial*, without Leave of the Court *Ibid.*

Of *Trials* at the Bar. Vi. *Privilege.*

Trover. 151.

Trover for fourteen Lemon-Trees licens'd to stand in a Lord's Garden; the Trees being separate, could not pass by the Grant of the Garden Page 170

Trover, for that the Surveyor of the Queen's Yard detained a Carpenter's Tools upon a pretended Usage 212

Where the very Denial of Goods is a Conversion *Ibid.*

In what Cases Indictment lies after Recovery in *Trover* or not 71, *Vid.* 87

Trust of a Lease, not destroyed by Renewal 57

Tytbes.

No *Tytbe* of Fish 223

Prohibition on the Statute of *Ed.* 6. for suing for *Tytbes* of barren Ground newly cultivated 86, 96

Prohibition to stay a Suit in the Spiritual Court for *Tytbe* Milk 261

V.

A *Vagrant* as such not indictable 240
Variance between the Record and the Indictment 168

Motions to change a *Venue* 191

Of Laying a *Venue* 222

No *Affidavit* of the Delivery of a Declaration, held up to the Rule 175

Rule on granting a *View*, where proper 211

Verdict, cures the want of alledging that which must have been proved to obtain it 129

W.

The TABLE.

W.	Will. Vid. Devise.
Warrant. Concerning an Attorney's Presence upon a <i>Warrant</i> given by one under Arrest, to confess a Judgment Page 85 A Man gives a <i>Warrant</i> of Attorney to confess Judgment the first Day of the Term, and dies, it may be entered at any Time during that Term 86 Way. Vid. Bridges. A Man cannot claim a <i>Way</i> over my Ground from one Part thereof to another; but from one Part to another of his own Ground he may claim a <i>Way</i> over my Land 3 A Stranger may have a <i>Way</i> over another's Soil three Manner of Ways: 1. For Necessity. 2. By Grant. 3. By Prescription Ibid. The Manner of Pleading a particular Estate of a <i>Way</i> 4 Privilege of the Grantee of a Wreck for a <i>Way</i> 149 —— to repair a <i>Way</i> 163 A <i>Way</i> cannot be changed without Act of Parliament 307	Debt lies for Money devised out of Lands Page 133 26, 27 Witness. Vid. Evidence and Proof. In case of a single Bill, two Persons, produced as Witnesses, ordered to write their Names 167 Subornation of <i>Witnesses</i> 203 The Party rescued, allowed as a <i>Witness</i>, and why 211 A former Oath of the Defendant's <i>Wife</i> allowed for Evidence of a Felony committed 216 The Counterpart of an ancient Deed lost, admitted for Evidence 225 In Ejectment to prove a Lease to the Queen, an ancient Book of Entries was offered 248 <i>Wreck</i>, the King's Prerogative therein 149 Writ. Vid. Return. If a Writ may not be legally executed on the Day of the Return, it shall not on the next Day 159, 196, 250, 251 It is illegal to fill up a Writ after it is sealed 310 Oyer of the <i>Writ</i> 28



F I N I S.

